

OFFICE OF MANAGEMENT AND BUDGET CENSORSHIP OF FEDERAL EMPLOYEES

HEARING BEFORE THE SUBCOMMITTEE ON THE CIVIL SERVICE OF THE COMMITTEE ON POST OFFICE AND CIVIL SERVICE HOUSE OF REPRESENTATIVES ONE HUNDRED FIRST CONGRESS

FIRST SESSION

MAY 17, 1989

Serial No. 101-8

Printed for the use of the Committee on Post Office and Civil Service



U.S. GOVERNMENT PRINTING OFFICE

19-353

WASHINGTON : 1989

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

H621-24.

COMMITTEE ON POST OFFICE AND CIVIL SERVICE

WILLIAM D. FORD, Michigan, *Chairman*

WILLIAM (BILL) CLAY, Missouri
PATRICIA SCHROEDER, Colorado
ROBERT GARCIA, New York
MICKEY LELAND, Texas
GUS YATRON, Pennsylvania
MARY ROSE OAKAR, Ohio
GERRY SIKORSKI, Minnesota
FRANK McCLOSKEY, Indiana
GARY L. ACKERMAN, New York
MERVYN M. DYMALLY, California
THOMAS C. SAWYER, Ohio
PAUL E. KANJORSKI, Pennsylvania
MORRIS K. UDALL, Arizona
RON DE LUGO, Virgin Islands

BENJAMIN A. GILMAN, New York
FRANK HORTON, New York
JOHN T. MYERS, Indiana
DON YOUNG, Alaska
DAN BURTON, Indiana
CONSTANCE A. MORELLA, Maryland
THOMAS J. RIDGE, Pennsylvania
ROD CHANDLER, Washington
(Vacancy)

PATRICIA F. RISSLER, *Staff Director*

ROBERT E. LOCKHART, *General Counsel*

ADRIENNE FIELDS, *Deputy Staff Director and Chief Clerk*

JOSEPH A. FISHER, *Minority Staff Director*

SUBCOMMITTEE ON THE CIVIL SERVICE

GERRY SIKORSKI, Minnesota, *Chairman*

PATRICIA SCHROEDER, Colorado
FRANK McCLOSKEY, Indiana

CONSTANCE A. MORELLA, Maryland
THOMAS J. RIDGE, Pennsylvania

DENNIS McGRANN, *Subcommittee Staff Director*

CONTENTS

Statement of:	Page
Gary D. Bass, executive director, OMB Watch.....	4
William Schultz, attorney, Public Citizen	31
J. William Hirzy, president, National Federation of Federal Employees Union, Local 2050, U.S. Environmental Protection Agency Headquar- ters	35
Communication from:	
Senator Jeff Bingaman, chairman, Subcommittee on Government Infor- mation and Regulation, U.S. Senate.....	3
John H. Buchanan, Jr., chairman, People for the American Way Action Fund.....	42

OMB CENSORSHIP OF FEDERAL EMPLOYEES

WEDNESDAY, MAY 17, 1989

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CIVIL SERVICE,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
Washington, DC.

The subcommittee met, pursuant to call, at 9:40 a.m., in room 311, Cannon House Office Building, Hon. Gerry Sikorski (chairman of the subcommittee) presiding.

Mr. SIKORSKI. The subcommittee will come to order.

This morning, the Civil Service Subcommittee will examine the effects of the Office of Management and Budget's oversight on Federal civil servants. The case of James Hansen, the Director of the Goddard Institute for Space Science at NASA, which was reported in the press last week, is just one recent example of how a dedicated and highly respected Federal employee can be stifled.

It has happened to Surgeon General Koop, it has happened to EPA scientists, and FDA researchers, and OSHA employees, and every agency that we are aware of. In fact, it happens all the time, perhaps every time someone from the executive branch testifies before Congress, or gives a speech, or publishes an article, or issues a press statement.

The Civil Service Subcommittee wants to know how often and under what authority OMB acts to change the work product of Federal employees, who at OMB is editing the work, and what their rank and qualifications are. For what purposes and under what guidance does OMB oversee the work of other Federal employees? What recourse is provided for Federal civil servants whose opinions are altered?

In Mr. Hansen's case, OMB's review and editing of his testimony—some have said censorship—before a Senate subcommittee on global warming raises real and serious questions about the propriety of having OMB officials with sometimes—apparently too often times—little technical expertise review and edit technical aspects of a civil servant's testimony before Congress and for the public.

As a member of the Energy and Commerce Committee Subcommittees on Oversight and Investigations, Health and Environment, and Transportation and Hazardous Materials, I have seen this very editing and conforming process used to squeeze and squish agency civil servants and their testimony into ideological mush. These are doctors, and scientists, and researchers, and specialists who are told what to say by, according to the White House, fourth or fifth level OMB examiners.

The editing of technical material not only affects the civil servant's morale, it also affects his or her professional reputation, and it affects directly the flow of accurate information to Congress, the press, and the public. Apparently that is the idea.

Unfortunately, the effect of OMB's oversight activities on Federal employees goes much deeper than the editing of testimony. OMB's influence over agency decision-making, especially in the timing, the development, and the wording of regulations to protect the health and the environment of 245 million Americans is taking its toll on many civil servants working at the Environmental Protection Agency and other such regulatory agencies.

While some would argue that the reining in of a creative and energetic work force is good management and even better politics, the loss of employee morale and its chilling effect on the proper functioning of an agency is a very high price to pay. Even higher is the ultimate price paid in this system of OMB overbearance, the truth.

The problem is compounded by additional factors, only a couple of which will be touched on today. During hearings recently conducted by the full Committee on Post Office and Civil Service and the Volcker Commission report, Commission members were critical of the increasing numbers of political appointees strategically placed in upper and mid-level management positions. The subcommittee is greatly concerned about the combined impact that OMB overseers and the increasing number of political appointees are having on the ability of agencies to continue operating in an unbiased and a professional manner. This subcommittee has planned a series of hearings on the Volcker Commission task force reports, and we will be revisiting the issue of political appointees in the future.

This morning, the subcommittee is interested in determining the dimensions, the dangers, and the design of this management process most recently raised by the Hansen incident. Assisting us are representatives from the National Federation of Federal Employees union local at EPA headquarters, OMB Watch, and Public Citizen. The subcommittee invited Mr. Darman and offered to accommodate his schedule. However, OMB's Legislative Affairs Office recently notified the subcommittee that Mr. Darman would be unable to attend due to other important scheduling constraints. Unfortunately, OMB permits only those officials who have been Senate confirmed to testify before Congress. Mr. Darman is the only Bush designee at OMB confirmed to date.

This chairman finds it more than a little ironic that OMB would not permit to testify the very people who actually edit the testimony of other Federal employees. OMB's Congressional Affairs Office tells us it would be bad precedent to allow nonappointed employees of the Office to speak for OMB, although OMB will let these very same OMB employees speak through and edit the employees of other agencies.

I would like to put in the record—which is a request by Jeff Bingaman, the chairman of the Subcommittee on Government Information and Regulation in the Senate—a letter that he wrote to the Honorable Richard Darman, Director of the Office of Management and Budget. Without objection, that will be placed in the record at this point.

[The letter follows:]

Hon. RICHARD DARMAN,
Director Office of Management and Budget, Washington, DC.

DEAR DIRECTOR DARMAN: I am writing to register my concern with you about OMB interference with congressional and public access to government information. I am particularly troubled by the recent activity of OMB's Legislative Reference Division which altered the facts and conclusions of testimony written by Dr. James Hansen who testified before a Senate subcommittee on May 8, 1989.

The free flow of government information, especially the diversity of views of government specialists, is a fundamental principle which must not be undercut. The alteration of Dr. Hansen's testimony reflects an especially troubling exercise of political power. In this case, research findings and views resulting from scientific inquiry were censored. The controversy surrounding Dr. Hansen's own conclusions about global warming is strong evidence that Congress and the public should hear as much as possible on the issue. Indeed, the May 8th testimony was not the first time Dr. Hansen's testimony was altered. In addition, other federal scientists have reported about OMB's efforts to rewrite their testimony.

I would like to know what steps you are taking to evaluate the activity of OMB in altering, modifying, and otherwise rewriting congressional testimony; what guidelines will you propose to ensure that censorship by any level of OMB employee does not occur; and what specific action do you plan to take to address the experience of Dr. Hansen? I was not satisfied with the recent White House statement that the actions taken to alter the findings and views of Dr. Hansen were those of a "fourth or fifth level" OMB employee. This neither justifies nor explains OMB's action.

You may be sure that as my Subcommittee conducts hearings, oversight, and authorization of legislation, I will remain attentive to the issues raised in this letter.

I look forward to hearing from you in the near future.

Sincerely,

JEFF BINGAMAN,

Chairman, Subcommittee on Government Information and Regulation.

Mr. SIKORSKI. Let me just read one paragraph from Mr. Bingaman's letter.

The free flow of government information, especially the diversity of views of government specialists, is a fundamental principle which must not be undercut. The alteration of Dr. Hansen's testimony reflects an especially troubling exercise of political power. In this case, research findings and views resulting from scientific inquiry were censored. The controversy surrounding Dr. Hansen's own conclusions about global warming is strong evidence that Congress and the public should hear as much as possible on the issue. Indeed, the May 8th testimony was not the first time Dr. Hansen's testimony was altered. In addition, other Federal scientists have reported about OMB's efforts to rewrite their testimony.

We, as Mr. Bingaman does, would like to find out just how a fourth or fifth level OMB employee, according to the White House, justifies or explains OMB's editing action.

Our first witness is Mr. Gary Bass, who is the executive director of OMB Watch. OMB Watch is the nonprofit research and advocacy organization monitoring OMB. Mr. Bass is an expert on community right to know issues and has helped EPA put together their data base mandated by the community right to know law so that citizens can more easily access data about the toxics in their communities in the air, in the soil, and in the water. He is an authority on OMB's operation, and we are pleased to have him with us this morning.

Mr. Bass, your entire statement will be placed in the record, as you wish, and we will ask you to spend 10 minutes this morning hitting the high points. We thank you for your testimony. I had a chance to review it and appreciate it.

STATEMENT OF GARY D. BASS, EXECUTIVE DIRECTOR, OMB
WATCH

Mr. BASS. Thank you, Mr. Chairman. I will try to keep within the 10 minutes point you made.

Members of the subcommittee, I think there has been the long standing concern over interference by OMB in the substantive work of what agencies do. It has been heightened, as you have indicated, by Dr. Hansen's situation of late.

What I hope to do is really just summarize the powers which OMB has and then, in specific cases, identify some examples that demonstrate how OMB has pushed itself on to the agencies.

Let me start by saying that since 1921 OMB has had an enormous amount of control over the agencies. OMB's predecessor, the Bureau of the Budget, had control over the budgetary capabilities as well as legislative clearance. It is only within, say, the last 10 years and, in particular, since the Office of Information and Regulatory Affairs was created through the Paperwork Reduction Act that so much more power has been given to OMB to control specific agency decisions.

The reach of OMB today includes not only budgetary issues and legislative clearances but virtually any activities—statistical policy, nearly all regulations, almost all Government information, both collection and dissemination. In effect, what we have, when taken its totality, is that OMB can exert, in essence, a cradle-to-grave influence over agency decision-making.

Many of these decisions have had an enormously stifling effect on the substantive activities of agencies. It has had a chilling effect on much of the work of civil servants and has had a deleterious effect on morale.

What is important isn't to look at each specific incident but, rather, to start to put together the incidents and take a picture, a cumulative picture or total picture, of what we have today.

Let me start by describing some of the executive orders with which OMB operates. Executive Order 12291, as we all recall, was the order that President Reagan put into effect when he took office. This is the regulatory control power that gives OMB the authority to request cost-benefit analysis. It does not give, in effect, OMB the authority to veto or to disapprove any regulation that an agency submits. However, because OMB can sit on a regulation and delay it indefinitely, or because it can send it back to the agency and request a revised cost-benefit analysis, in effect, OMB does have veto authority.

You can take a look at any issue, from Reye's Syndrome to Toxic Shock Syndrome, from hazard communication to ethylene oxide, on down, from every agency; there has been a well chronicled and documented list of OMB interference in the substance of what agencies do. In effect, what we have had is OMB second-guessing agency experts, ignoring agency-run peer reviews, circumventing the will of Congress and the courts, and generally an imposition of ideological imperatives on agencies.

Let me just turn back the time of the clock a little bit here and move to the asbestos issue that Congressman Dingell's Oversight

and Investigations Subcommittee did such a good job of documenting.

The asbestos ban and phase-down regulations was an incident where EPA and OMB had a number of disagreements. The Dingell subcommittee report does an excellent job of reporting all the issues involved in that, but there are two critical points that relate to the work of this subcommittee today that came out.

One, OMB forced upon EPA a requirement, in essence, that EPA reconstruct or interpret the task of the Toxic Substance Control Act in a way that basically tied EPA's hands from doing the regulation that it felt was necessary.

Secondly, at the point where a cost-benefit analysis was being done, OMB imposed its own methodology of cost-benefit analysis on the agency, which was a discounting value of a human life. In effect, what happened is, OMB said that the value of a life is about a million dollars but you must discount for a 30- to 40-year latency period for the asbestos-related cancer to occur. In essence, the value of a life, according to OMB, could be as low as \$22,500, thereby undervaluing the benefit of the regulation of the carcinogen.

Lest you feel that this issue stopped in 1985 when Congressman Dingell handled this issue, it has not. You can turn around and look at any number of issues.

Right now, tampon labeling is a hot issue that is sitting there at OMB. Here is a situation where the FDA had worked on this issue for quite some time. There were a number of expert panels, a number of academy reports that said to go forward with some kind of labeling system on the absorbency of tampons along with standardized terms. FDA decided finally to regulate in this manner and sent over to OMB under the executive order very, very specific proposed regulations.

The regulation said in very specific terms, that is, FDA concluded that there is a need for standardized absorbency terms with unambiguous, accurate absorbency risk information. They had a chart that had "super" means "x" amount of absorbency and so on. When it was published in the Federal Register, it came out almost exactly reversed. What it said is that the proposal does not include restrictions on the use of absorbency terms, and, in fact, what they were looking for were comments. This change, this diametrically opposed change, was only because of OMB regulatory review. That type of micromanagement has an incredibly chilling effect on Federal employees.

Now how this was handled was, actually, an OMB desk officer, an employee at OMB, again second-guessed the experts at FDA. The issue is not over and is still going on.

So, if you think that the Executive Order gives such powers, you might say, "My goodness, that's overwhelming." But OMB did not stop there. In 1985, the President issued another Executive Order, Executive Order 12498. In this case, the order expanded OMB's powers to include not just simply a so-called scientific review of cost-benefit, but now the review criteria was "consistency with the administration's policies and priorities," a political litmus test at best.

On top of it, the reach of the OMB screen or review went as far back as what they would call pre-rule making actions—that is, anything that may some day lead to a regulation.

So what we have seen—and, by the way, it is almost next to impossible to see really what is happening under the Executive Order 12498 process, because all of it operates in secret—but what we have seen is agency activity that once was construed as information collection activity—that is, research—is now being pushed off as a pre-rule-making action. It is now being considered something that may lead to a regulation.

In addition, as I have indicated in my written testimony, there was a situation where the Public Health Service wanted to do a study, and it was basically required, or encouraged, by Congress to take a look at what kinds of impact the Federal budget cuts have had on infant mortality rates—kids dying.

What happened was that OMB said that because that information may lead to a regulation in the future, the Public Health Service is supposed to send this over as a pre-rule-making action. Now once it is pre-rule-making, there is no public scrutiny; OMB simply works with the agencies, and they may verbally say, "Don't do this," or, "Do this with x amounts of changes."

I have included in my testimony a memorandum from a Public Health Service employee to his boss that documented one of these kinds of conversations. What you see in that kind of memo is, in essence, the first seven, OMB says, "Yes, you can go do this;" the next seven or so, "Yes, you can do this if you make some changes;" and the last six, "You can't do these." One of those last six was the infant mortality study. It lacked consistency with the President's policies and priorities.

Again, agencies feel as though they are working on something, and then all of a sudden the heavy hand of OMB comes down.

One other area I want to address is the Paperwork Reduction Act. If you think OMB has agency control under the first two executive orders, wait till we turn to the Paperwork Reduction Act. Here you have a situation where any kind of collection of information that affects 10 or more people has to go before the OMB screening process. In this case, OMB does have statutory authority granted by Congress to approve or disapprove any action, and the terms of the disapproval can be that it lacks practical utility.

There is an enormous litany of examples where OMB has interfered in the substance of what agencies are doing. This has set back many agency people from even recommending to do work, if even wanting to do it at all. I have identified in my written testimony three such examples. Let me just pull out one to give you a sense of this: video-display terminals' impact on reproductive health habits.

Here was a situation where there has been a number of nongovernmental studies identifying cohorts at risk by the exposures to video-display terminals, VDT's. The Government decided that it should do a study. After a number of peer review panels had gone through the study design, offered up suggestions in the makeup of the questions, even where industry had its concerns and participated in the peer review, it then went to OMB for review.

The advantage of the study was to identify if there were specific reasons why reproductive health problems were occurring. There were questions dealing with stress and fertility, to identify if those factors had any impact. An OMB desk officer—again, a low level person, relatively low level person at OMB—reviewed it as part of his or her daily activities and simply disapproved the study. After Congress intervened, OMB gave approval.

Many people think that because OMB approves something it is all over. Well, upon inspection, OMB deleted all the questions that dealt with stress and fertility. Congress then asked epidemiologists and other experts to review what OMB's actions did, and uniformly, unanimously, the scientists agreed it would gut the impact of the study. In the end, because of Congressional intervention, OMB approved it.

The solution is not for OMB intervention on each issue, the solution is to respect the scientific expertise of the agency personnel. This was a very costly process and did not achieve any improvement in the study.

I must say just on one other issue dealing with hazard communication standards, commonly known as the worker right to know regulations, that the issue here has moved all the way into the court system, and the U.S. Court of Appeals for the Third Circuit has specifically told OMB that they have exerted undue influence on OSHA and, in fact, said that OMB has no authority to exert its substantive control over agencies. As of yesterday, that decision was accepted by the Supreme Court on appeal, and we will see what happens there.

The record is clear. OMB has got agencies coming and it has got agencies going. The individual examples that I have cited start to develop a big picture.

In addition to these kinds of regulatory or individual action controls, there is the point that you made in your opening statement about the control over legislative clearance. How that is really done at OMB is through something called OMB Circular A-19. That circular has its origins originally in an executive order from 1939. The clearance process at OMB covers all agencies, first of all, including the District of Columbia when its decisions affect the relationship of Federal decision-making. The only time an agency is not covered by OMB Circular A-19 is when it is required in statute to report directly to Congress without prior submission to OMB.

When must an agency submit something to OMB? The coverage of Circular A-19 includes proposed legislation, pending bills, enrolled bills, views letters on specific legislation, and then a term called "reports." Now under this term called "reports," that includes the word "testimony." Unfortunately, the language of OMB Circular A-19 refers to the testimony only in the respect of a legislative proposal. It doesn't necessarily speak about policy issues or science issues; there is no guidance in that area. Similarly, A-19 does not provide for any kind of an appeal process. There may be other kinds of approaches that OMB has sent as messages to its agencies, but there is nothing in A-19 that speaks to that.

Finally, you should understand that OMB's control under A-19 speaks to "advice" to agencies. Now at one point in the circular it says that if an agency chooses to incorporate OMB's advice, fine; if,

upon review at the agency level, it does not choose to accept OMB's advice, it should send it back to OMB to see how it is being handled.

There is a sentence in A-19 that says that the OMB advice upon final review is to be inserted in the report—testimony in this case. What is unclear is whether or not that means that that is to replace the witness's existing testimony or is to be included as, "OMB's point of view is * * *" versus, "An agency's point of view is * * *". In past times, historically, we have seen, for example, Secretary Patricia Harris had oftentimes added both the OMB view and a personal view. In point of fact, in many cases agency people come up and say, "In my opinion, it is x; in the administration's view, it is y."

Let me also say that, taking all these points together, what does this mean for agencies? I could speak to EPA, I could speak to any agency. The three points I want to make are true throughout the Government with this kind of pressure that OMB puts on agency.

Number one is, it is stifling creativity among agency personnel. In many cases, we are dealing with opportunities for innovative programming, innovative methods for protecting the basic rights, if not the health and safety, of the public, and this OMB external influence in many cases is stifling agency creativity.

Secondly, in many cases agencies are not fulfilling their statutory missions or at least are not fully implementing the intent of a law. What is happening is, you have an agency person who simply says, "Why should I go through this process when I think OMB will simply disapprove it?" So in many cases an agency person simply doesn't even go through that process because of some broader image that OMB will never even go with this idea.

The final point that I want to make in terms of the impact on agencies is, there is becoming a lack of certainty who is in charge here. In one sense, the agency is accountable to the public. The public submits comments to the agencies, the public sues the agency, and yet what you have is, agency personnel are uncertain because you have OMB telling them substantively what they are to do. So there is a great deal of uncertainty.

All of this leads me to a conclusion, and that is that we have a serious problem. That problem is that we have OMB with an enormous amount of influence and carrying the big stick of budget, carrying the big stick of regulatory control, carrying the big stick of legislative clearance, and so on down the line. Agencies really have to comply even if it is only "voluntary" as OMB says it is.

I think what this subcommittee could help with—there are really three areas. One is, this year the Paperwork Reduction Act, which is one of the few areas in which Congress has given express statutory authority to OMB to do these kinds of line-by-line agency reviews, is up for reauthorization. It would be very helpful for this subcommittee, once it has compiled its record, to share its information with the House Government Operations Committee which has jurisdiction over that area. We cannot let this kind of activity continue. We have to put the proper reins on it and put the proper delegation back to the agencies, not to OMB.

Secondly, I think the issue here is not the centralization of review that OMB does. We have a large bureaucracy. There is no

doubt that there is a rightful and a helpful role that OMB can play. The issue is centralization of political control over agencies. That must be stopped. That has got to be stopped. It is inconsistent with the congressional delegation of power to agencies; it is a bad idea in terms of overriding agency expertise.

That all leads to my last point, and that is that Congress has got to assert itself. The times are different than they ever were. We have an enormous administrative Government now. It is very large. It is something which Congress has not spoken to and Congress has to say, "Here is what we want decision-making to look like." We have a problem of a balance of power where, by fiat, OMB and the White House are taking control. We have a situation where we are growing into what we call the legislative presidency, and, again, the balance of power is shifting back to the White House. That pendulum has to be swung back, and Congress has to assert itself. In doing so, I want to reiterate, it really must be done so as to emphasize the expertise of agency personnel, where the delegation of power was rightfully sent.

Thank you for giving me the opportunity to share my comments with you today.

[The statement of Mr. Bass follows:]

Statement of
Gary D. Bass, Ph.D.
Executive Director
OMB Watch

before the
Civil Service Subcommittee
of the
House Post Office and Civil Service Committee

May 17, 1989

My name is Gary Bass and I am executive director of OMB Watch, a nonprofit research and advocacy organization based in Washington, D.C. OMB Watch was started in 1983 to educate the public about the activities of the Office of Management and Budget and to encourage greater accountability of the White House agency.

While we are known for our budget analyses, most of our energy is devoted to following the activities of the "M" side of OMB -- the Management side. In particular, we have been following the activities of the Office of Information and Regulatory Affairs (OIRA) within OMB, an office that was created by the Paperwork Reduction Act in 1980.

Since 1921, when OMB's predecessor, the Bureau of the Budget, was created, the budget office has enjoyed enormous influence over agency activities through the control of budgets and resource allocations, and through the coordination and clearance of legislative proposals. It is only within the last decade or so, particularly since the creation of OIRA, that OMB has come to wield extraordinary powers -- almost always operating behind the scenes under a veil of secrecy.

The reach of OMB now includes not only budgetary and legislative clearance, but also the clearance of statistical policies, nearly all regulations, and the collection and dissemination of government information. In other words, almost every governmental activity of any significance must pass OMB screening. With its powers taken together, OMB can effectively exert a "cradle to grave" influence over agency decision-making.

Many of OMB's initiatives have had a stifling effect on the substantive activities of agencies, and, at times, these OMB decisions have had a deleterious effect on agency morale. Even more important than any single OMB decision is the cumulative effect OMB decisions have had -- a chilling impact on agency creativity and even initiative. Let me pursue this point more fully by describing three major powers that OMB has been using, along with specific examples of OMB obstruction of agency activities.

Testimony of Gary D. Bass, Ph.D.
 OMB Watch
 May 17, 1989
 Page 2 of 11

E.O. 12291

E.O. 12291, Federal Regulation, issued by President Reagan just after taking office on February 17, 1981, went far beyond previous presidential executive orders by requiring that agencies not only assess the economic costs and benefits of every proposed rule, but also be guided by the results of those assessments as reviewed and interpreted by OMB. This significantly restricted the discretion of the rulemaking agencies, while giving unprecedented power to OMB.

OMB's powers under E.O. 12291 to control the substantive activities of agencies has been well-chronicled. From Reye's Syndrome to Toxic Shock Syndrome; from hazards communication to ethylene oxide; from asbestos to lead in gasoline and ceramics; from fuel economy standards to tire quality grading -- OMB has exercised its authority under E.O. 12291 to second guess agency experts, ignore agency-run peer reviews, circumvent the will of Congress and the courts, and generally impose ideological imperatives on agencies.

Strictly speaking, E.O. 12291 does not grant OMB control of agency regulations. The order states that its requirements shall not be "construed as displacing the agencies' responsibilities delegated by law." Yet an agency cannot issue a rule until the completion of the OMB review. As a practical matter, this prerogative gives OMB veto power over agency regulations.

Every year since 1981, the percentage of regulations reviewed under E.O. 12291 and altered by OMB has increased. In 1981, 16% of agency regulatory proposals underwent some type of change due to OMB review; in 1987, 30% did.

Let's take one of the examples I mentioned above to more fully appreciate the power OMB can exert over agency experts. Congressman John Dingell's Oversight and Investigations Subcommittee has done an excellent job of describing OMB's interference on regulation of asbestos. In his October, 1985 report, "EPA's Asbestos Regulations," the subcommittee, among other things, described how OMB:

- Forced EPA to adopt an unusual interpretation of the Toxic Substances Control Act. The interpretation would have tied EPA's hands in controlling asbestos, one of the most well-documented human carcinogens; and
- Behind closed doors tried to impose on EPA experts OMB's cost-benefit analysis that would have discounted the value of a human life by assigning each a base value of \$1 million and then discounting the value over a 30 to

Testimony of Gary D. Bass, Ph.D.
 OMB Watch
 May 17, 1989
 Page 3 of 11

40 year latency period for the asbestos-related cancer. This arbitrary discounting methodology would reduce the value of life to as low as \$22,500, thereby undervaluing the benefit of regulating the carcinogen.

Lest anyone think that this type of heavy-handed interference has stopped, take a look at what is happening with tampon labeling. The Food and Drug Administration believes that the continued lack of standardization of absorbency terms (e.g., regular or super) among brands is confusing and misleading. This became particularly pressing after Toxic Shock Syndrome (TSS) -- a serious and potentially fatal disease -- was linked to the use of high absorbency tampons. The risk of TSS can be greatly reduced if women are provided information about the absorbency rates of tampons.

Since 1982, FDA officials have conducted absorbency tests and reviewed uniform labeling options. After several years, FDA submitted its regulatory proposal to OMB for review under E.O. 12291. In went to OMB with the conclusion that there was a need for standardized absorbency terms with associated numerical absorbency ranges. The proposed rule that OMB reviewed contain absorbency terms with numerical ranges (e.g., Super -- Absorbency 9-12 grams). However, what FDA published in the Federal Register was very different. The before and after is described below.

 FDA Submission to OMB under E.O. 12291:

"FDA has received hundreds of comments from consumers indicating that they believe that the terms as currently used are misleading and should be standardized to facilitate interbrand comparisons.

For these reasons, FDA has concluded that the use of nonoverlapping numerical absorbency ranges with standardized absorbency terms will provide unambiguous and accurate absorbency and relevant risk information to consumers, and takes advantage of consumer familiarity with current terms."

FDA Publication of the NPRM in the Federal Register

"Therefore, this proposal does not include restrictions on the use of absorbency terms. The agency invites comment on whether further action to standardize labeling is warranted in order to ensure that tampon absorbency information is conveyed to consumers in a clear, nonmisleading fashion."

Testimony of Gary D. Bass, Ph.D.
 OMB Watch
 May 17, 1989
 Page 4 of 11

This alteration happened only because of OMB regulatory review.

Needless to say, this type of micro-management can have a very chilling effect on federal employees. With agency experts being second-guessed and undercut by OMB desk officers, it raises, at times, insurmountable barriers for federal workers to get their job done. If this continues, OMB interference will become a disincentive for agency employees to identify potential improvements in federal programs and provide recommendations for regulatory improvements. Increasingly, there is a sense that agency experts do not control the substantive matters of agency decisions. Agencies start to think through ideas not in terms of what is best, but what is likely to pass muster at OMB -- and, in the end, the public is not well served.

E.O. 12498

As though E.O. 12291 was not enough, a new executive order was added to OMB's arsenal. E.O. 12498, The Regulatory Planning Process, was issued on January 4, 1985 by President Reagan to "establish Administration regulatory priorities" and to develop an annual Administration regulatory program. Under E.O. 12498, agencies must submit to OMB each year a draft regulatory program for the reporting year of April 1 through March 31. This program is now published as an appendix to the U.S. Budget as the "The Regulatory Program."

E.O. 12498 is significant for three reasons. First, unlike E.O. 12291, which halts rulemaking only until OMB finishes its review, E.O. 12498 prohibits an agency from doing any work until OMB gives the go-ahead. Second, the standard of review is not a single objective, such as E.O. 12291's cost-benefit principle, but rather a broader concern about "consistency with Administration policies and priorities."

Finally, E.O. 12498 increased the scope of OMB review to include "pre-rulemaking" activities. OMB has defined pre-rulemaking as:

[A]ny important action taken to consider whether to initiate, or in contemplation of, rulemaking; publications of advance notice of proposed rulemaking and all similar notices, publications, and requests for public comment; and development or dissemination of draft guidelines, policy proposals, strategy statements, and similar documents that may influence, anticipate or could

Testimony of Gary D. Bass, Ph.D.
OMB Watch
May 17, 1989
Page 5 of 11

lead to the commencement of rulemaking proceedings at a later date.

According to OMB instructions to agencies, this pre-rulemaking review could include a decision to initiate a research contract, create a task force, or conduct a study. Review of pre-rulemaking actions is OMB's guarantee that it can conclusively control agency decision-making. It can stop an agency from holding task force meetings or announcing preliminary plans to consider rulemaking. It can halt research proposals before they even get started.

It should be understood that there are two tracks at OIRA -- paperwork review and regulatory review. Under paperwork review, an agency publishes a notice in the Federal Register that it sent a proposal to OMB for review. All OMB decisions are subject to public scrutiny, and the public may submit comments to OMB. Under E.O. 12498 review, there is no notice in the Federal Register, and no opportunity for the public to comment. In fact, one cannot even find out what agencies are proposing.

OMB can require agencies to submit research for review as "pre-rulemaking" -- thereby eliminating public notice of the OMB review. Normally research would be submitted under the paperwork review track -- where a public record is created. Exhibit A provides an example of this happening. A director of a division within the Health Care Financing Administration felt that a survey on ambulatory surgical centers should be reviewed as paperwork, not as a prerulemaking action under E.O. 12498. OMB, however, had the final say as evidenced by its publication in the "Regulatory Program."

Because there is no requirement for OMB to justify its E.O. 12498 decisions as part of the public record, and because there is no opportunity for public access to the agency materials as they are sent to OMB for review, there is simply no way to know how often OMB cuts agencies off from even starting work in an area that may lead to rulemaking. It is known, however, that it is happening.

For example, during the first year of the Regulatory Program, OMB Watch discovered that a proposed Public Health Service study to examine the effect of budget cuts on infant mortality rates was killed under E.O. 12498. Even though it was a study, OMB considered it prerulemaking because it could have led to a rulemaking. OMB reviewed the proposal and considered it "not consistent with Administration policies and priorities." As a result, PHS was not permitted to work on the survey.

Testimony of Gary D. Bass, Ph.D.

OMB Watch

May 17, 1989

Page 6 of 11

Exhibit B provides a memo from a Public Health Service Regulations Officer that shows how OMB works with agencies -- most often not documenting its decisions. In summary, the memo states that the OMB desk officer told PHS that OMB would approve seven proposals; that seven would be approved if changes were made; and that six others would be disapproved. One of the six to be disapproved was the infant mortality study described above.

Through E.O. 12498, OMB has the potential to censor agency officials by setting agency regulatory agendas, both in determining the content of the agenda and by its ability to prevent an agency from taking even a "pre-rulemaking" action which is deemed inconsistent with Administration policies. It is probably OMB's most powerful tool over agency actions and the least understood by the public or Congress.

Paperwork Reduction Act

While the two executive orders may seem all-encompassing and can create quite a barrier for agency personnel to get their work done, OMB has yet another weapon -- the Paperwork Reduction Act. The Act instructs OMB to review any form, survey, questionnaire, reporting requirement, or other means of information collection that is sent to 10 or more people. OMB reviews the agency's proposal to determine whether it "is necessary for the proper performance" of the agency. Its single greatest review criteria is whether or not the information collection proposal has "practical utility." If the information collection proposal is not approved by OMB, the agency may not undertake the activity.

The paperwork clearance process gives individual OMB personnel an enormous amount of discretion. An OMB desk officer can force agencies to accept private interests or Administration views, overruling agency professionals and disregarding legislative and judicial mandates.

For example, between 1984 and 1986, OMB was seven times more likely to disapprove proposals for occupational and environmental disease research by the Centers for Disease Control than for research on infectious and other conventional diseases.

The list of examples where OMB has supplanted or simply stopped agency work through paperwork review is almost endless. Three more highly publicized situations where OMB desk officers interfered with agency activities include: a

Testimony of Gary D. Bass, Ph.D.
OMB Watch
May 17, 1989
Page 7 of 11

study on the link between use of video display terminals (VDTs) and adverse reproductive effects; the decennial census "dress rehearsal;" and OSHA's worker right-to-know regulations.

In the case of the VDT study, OMB simply disapproved the NIOSH proposal -- even after it had been peer-reviewed by NIOSH. After congressional intervention, OMB approved the study but deleted questions dealing with stress and fertility. Scientists uniformly concurred that the OMB changes would gut the intent of the study. It took further congressional intervention to restore the survey questions, but questions still linger over the appropriate role of OMB desk officers in reviewing agency "paperwork."

The power of OMB desk officers is even more clearly seen in the case of the 1990 decennial census "dress rehearsal." Here, OMB only "raised questions" and offered "suggestions" on questions dealing housing, utility costs, and others. OMB's seemingly benign "suggestions" sent Census officials scurrying. Census officials went "public" with OMB's "questions," considerable public interest was devoted to the issue, and congressional intervention was required to get OMB to approve the "dress rehearsal." In the end, after considerable delay, additional money being spent, and the realization that the OMB desk officer had neither the statistical nor programmatic expertise for "suggesting" changes, the dress rehearsal was started. Despite the bipartisan uproar, the Administrator of OIRA continued to use this case as an example of the proper role of OMB.

The final example, dealing with OSHA's worker right-to-know rules, demonstrates that the courts are also not willing to stand for OMB intervention in the substantive work of agency. After the U.S. Court of Appeals for the Third Circuit told OSHA twice to issue rules to protect workers in the nonmanufacturing sector, OSHA finally did. With such an emphatic court order, no one thought there would be a problem.

However, to implement the OSHA regulation required OMB paperwork clearance. OMB had a public meeting at industry's request to "protect their regulatory due process." OMB then promptly disapproved portions of the paperwork and required OSHA to re-enter rulemaking. The effect was to nullify the court order.

The case went before the Third Circuit again. This time the court ruled: "The object of these information disclosure requirements, in accordance with the OSH Act, is to increase workplace awareness of hazards, thereby enabling workers to

Testimony of Gary D. Bass, Ph.D.
 OMB Watch
 May 17, 1989
 Page 8 of 11

avoid injury, illness or death. Nothing in the Paperwork Reduction Act suggests a congressional intention to allow OMB, in the guise of regulating collection of information, the authority to second guess other federal agencies with respect to the kinds of disclosure needed to accomplish substantive policies entrusted to such agencies." The case will now be heard, on appeal, by the Supreme Court.

The record is clear: OMB has got the agencies coming and going. These individual examples begin to suggest OMB's cumulative toll on agency initiative and efficiency.

OMB's Impact on EPA

To what degree has OMB interference already influenced agency initiative and efficiency? Most certainly each agency is different and reacts in individual ways to OMB's interference. Nevertheless, there are some commonalities, and some examples from EPA may help shed light on the question.

1. Stifling creativity. In working with EPA on the Community Right-to-Know law (Title III of the 1986 Superfund reauthorization), which provides for public access to information about the use of toxic chemicals in their communities, we have found EPA most eager to aggressively implement the law. However, the law breaks new ground in several areas, such as requiring a publicly accessible online telecommunications system. The law is truly precedential and requires agency creativity to fully execute the intent of the law.

In the planning for information requests, regulations, and program implementation, however, we have found that EPA officials often think more about what OMB will approve than what is necessarily best for statutory implementation. For example, to more effectively implement Title III, the EPA Administrator is authorized to assess penalties to facilities not complying with the law. However, there is a disincentive to assess penalties for two reasons:

- For every incorrect form EPA receives, it costs money to record the information, send out a penalty notice, and then re-record the revised information. Unfortunately, Title III budgetary resources are very limited and pursuing penalty notices may take funds from other parts of the law; and
- Revenue generated from penalty fees goes to the U.S. Treasury and is not earmarked for the Title III program.

Testimony of Gary D. Bass, Ph.D.
 OMB Watch
 May 17, 1989
 Page 9 of 11

Many thought it might be a good idea to channel penalty fees into program improvements -- it would be a way of getting additional revenues and give incentive to enforcement. But this would have required a special ruling from OMB. Since EPA felt that OMB would never approve such an activity the idea quickly died.

2. Not fulfilling statutory missions. Over the past few years, EPA has resisted collecting information which would help environmental protection and is statutorily authorized. Their argument is that OMB would not approve the paperwork under the Paperwork Reduction Act. For example, Section 114 of the Clean Air Act provides statutory authority for EPA to survey industry to collect information. Public interest groups tell us that EPA will not use its statutory authority because the agency believes OMB will simply reject the proposal. From EPA's perspective, why spend the time completing all the mandatory paperwork for OMB review if they think OMB will not approve of the activity. In the end, the full intent of laws may go unmet.

3. Lack of certainty about who is in charge. Negotiated rulemaking is a relatively new regulatory innovation where participants from the public and the government agency try to reach consensus on regulatory principles prior to publication of a proposed rule in the Federal Register. EPA convened a number of representatives to negotiate on rules for asbestos in the schools. Participants described an interesting phenomena. EPA personnel kept looking at the OMB representative for signs of approval or disapproval during the process.

In talking with EPA staff, they acknowledged that they were "trying to get a read on OMB." Once again, we find agency experts thinking more about what OMB will pass than what is best for the public.

A worst case scenario of an EPA negotiated regulation involved setting standards for wood burning stoves used in homes (as required by Section 111 of the Clean Air Act). EPA convened representatives of industry and the public interest to develop a consensus on proposed regulations covering the noxious fumes released by the wood burning stoves. There was a tentative agreement among the participants, and EPA proceeded with publishing the compromise regulation. The regulation involved paperwork, which, in turn, was disapproved by OMB. As a result, the entire negotiation process was negated and had to be started over.

While most of the criticism can be leveled at OMB, agency personnel must also take responsibility. All too

Testimony of Gary D. Bass, Ph.D.
 OMB Watch
 May 17, 1989
 Page 10 of 11

often EPA personnel (and others) use OMB as scapegoat for not undertaking an activity. Nonetheless, the impact of OMB's power is formidable and indisputably affects agency decision-making -- particularly in the three areas just mentioned.

Conclusion

In conclusion, I would like to make three recommendations to this Subcommittee. First, this Subcommittee should coordinate its concerns with the House Government Operations Committee, which has jurisdiction over reauthorization of the Paperwork Reduction Act. The Paperwork Reduction Act established the Office of Information and Regulatory Affairs -- the office that has caused the problems described in this testimony. It is one of the few existing vehicles in which Congress can require public access to and accountability of OMB actions, while simultaneously insuring that the proper delegation of authority remains with agencies, not OMB.

Second, Congress must recognize that a gatekeeper role is always needed in a large bureaucracy, and that OMB can and should serve this role. The problem is not necessarily OMB's centralized reviews. Rather the problem is the degree that centralized review turns into centralized political control. Centralized review in itself is not inconsistent with management improvement or with deference to agency authority. OMB can, and should assist the agencies with their activities. However, it should be the duty of the agency heads (also political appointees) -- and not OMB -- to balance the substantive and political merits of any given initiative.

This leads to the last point -- and probably the most important one. Congress needs to assert itself in setting policy on the administrative decision-making process. Even if the founding fathers envisioned executive control over the government as a countervailing force to legislative political control, they could not have envisioned an administrative state such as we have today, where most policy decisions are made not in the legislature but by the administrative agencies.

If the core function of Congress is to control policy, or at least to have a substantial say in policy decisions, then a role in controlling administrative process becomes increasingly important. Furthermore, the rise in the "legislative presidency" -- that is, the role of the President in introducing or greatly influencing legislation -- makes it necessary for Congress to have power over administrative activity in order to maintain the balance of power.

Testimony of Gary D. Bass, Ph.D.

OMB Watch

May 17, 1989

Page 11 of 11

Congress must make affirmative statements about the handling of regulatory review and the collection and dissemination of public information. In doing so, it should reassert the delegation of authority to the agencies -- where the experts work -- not to a White House political agency.

Thank you for giving me the opportunity to share my views with you. If OMB Watch can be of further service to the Subcommittee, please let us know.

Exhibit A



DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care Financing Administration

6325 Security Boulevard
Baltimore, MD 21207

MAR 21 1965

NOTE TO: Harry Hetherington

The form from EOMB Bulletin No. 85-9 is inappropriate for the Ambulatory Surgical Center survey. This is not a significant regulatory action. Therefore I do not believe this should go forward. It is accounted for under the normal information collection rules.

Carl Slutter

SOURCE: Regulatory Program
of the United States Gov-
ernment: April 1, 1985 -
March 31, 1986

From Page 78:

Agency Contact

Carl Slutter, Director
Division of Provider Payment Policy
HCFA, Rm. 1-A-1 ELR
6325 Security Boulevard
Baltimore, Maryland 21207
(301) 594-7365

RIN: 0938-AP89

**Health Care Financing
Administration**

Prerule Stage

**AMBULATORY SURGICAL CENTER
PAYMENT RATE SURVEY**

Problem To Be Solved

Data on Ambulatory Surgical Center (ASC) costs and charges are not current. Rates now in effect have been

used for over 30 months without any adjustments to account for changes in the market, medical technology and inflation.

Section 934 of Public Law 96-499 provides for payment under Part B of Medicare for specific surgical procedures performed in an ambulatory setting. The amount paid represents the Secretary's estimate of a fair fee for the cost of facility services provided in conjunction with a procedure. The rate does not include physician fees and other medical items and services (e.g., prosthetic devices). The accompanying Conference Report states, "... This overhead factor is expected to be calculated on a prospective basis (and periodically updated) utilizing sample survey or similar techniques to establish reasonable estimated overhead allowances for each of the listed procedures...."

Need For Federal Solution

The ASC benefit is a Medicare benefit which is the responsibility of the Federal government. Amounts paid are to be established by the Secretary.

Approach

The regulations governing Medicare participating ASCs are found at 42 CFR 416. Sections 416.30(d) and 416.140 address the recordkeeping and reporting requirements necessary to comply with the intent of Congress to periodically review and update the payment rates.

Consistent with these provisions, we have developed the HCFA-452, Ambulatory Surgical Center Payment Rate Survey, to collect information to review and revise ASC facility rates if the Secretary decides to update them. The survey is designed to capture cost information relating to overhead expenses of the ASC facility and charge information on the procedures performed in ASCs. Using this information, HCFA will analyze ASC facility payment rates and make necessary revisions to these rates where appropriate.

The completion of this survey will be required of all Medicare participating ASCs, and HCFA will accept completed surveys voluntarily submitted by nonparticipating facilities. Currently there are estimated to be no more than 180 Medicare participating ASCs.

HCFA proposes collecting information from 100 percent of the certified facilities in order to establish a baseline so that HCFA will be in a better position to determine a proper sampling methodology for future collections.

Next Steps

Legal deadline: None.

Milestones:

Action	Date
Begin survey	September 1985
Complete survey	November 1985
Publication of proposed rule	June 1986

Exhibit B

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Office of the Assistant Secretary
for Health
Washington DC 20201

MAR 21 1985

NOTE TO DR. MASONThrough: Acting DASH-P&E 12/Friedman

Subject: OMB Informal Comments on HRSA Regulatory Plan

On March 19, Paul Schwab, Director, Office of Program Policy Coordination, HRSA; and Jack Phelan, ES/OS met with Faye Iudicello, OMB, to discuss the HRSA portion of the PHS Regulatory Plan.

Paul Schwab said that OMB intends to provide to all Departments a formal feedback to the Regulatory Plans submitted to OMB. The purpose of the meeting was for OMB staff to discuss informally with agency staff the contents of the items submitted in the Regulatory Plan.

Faye Iudicello indicated that of the items included in the HRSA Regulatory Plan, OMB would most likely approve the following items for inclusion in the Administration's Regulatory Plan to be published in May:

1. Health Education Assistance Loan Program (NPRM)
2. Health Professions Student Loan Program (Final Rule)
3. Nursing Student Loan Program (Final Rule)
4. Limitation on Federal Participation for Capital Expenditures (Section 1122) (Final Rule)
5. Grants for Hospital Construction and Modernization; Federal Right of Recovery and Waiver of Recovery (Final Rule)
6. Reasonable Volume of Uncompensated Services to Persons Unable to Pay (Hill-Burton -- Public Hospitals) (NPRM)
7. Reasonable Volume of Uncompensated Services to Persons Unable to Pay (Hill Burton -- General Program Review) (Prerulemaking Activity)

-2-

During the discussion of these seven items, Faye Iudicello stated that OMB expects that the regulations for the Health Profession Student Loan Program and the Nursing Student Loan Program will be based on a 5% default standard and that this standard will be calculated on the basis of the number of dollars in default. Dr. Graham had reached an agreement with Patti Tyson and Mac Haddow, Office of the Secretary, that these programs would be based on a 5% default standard; however, the schools would be allowed to calculate the default rate on the basis of either the number of dollars in default or the number of borrowers in default. If the regulations are changed as OMB indicates, some of the schools will have a higher default rate. Jack Phelan told Paul Schwab that unless Dr. Graham objects, OS would go along with OMB's recommendation. Dr. Graham has instructed Paul Schwab to tell Jack Phelan that it is Dr. Graham's best professional advice that the Department has done a lot so far to improve the debt management activities of the schools and many of the schools have acted to reduce their level of defaults. Dr. Graham sees no advantage in calculating the default rate on the basis of dollars only. To do so may cause the schools to believe that the Department is changing signals mid-stream and may raise unnecessary Congressional interest. Dr. Graham indicated, however, that if OS chooses not to accept his advice, HRSA will not push the issue further and will act to revise the regulations along the lines recommended by OMB.

OMB indicated that if HRSA wants to pursue the following seven items in the Regulatory Plan, the agency will have to submit more convincing information:

1. Elimination and Phase-Out of Hansen's Disease (Leprosy) Special Pay for Civil Service Employees (NPRM)
2. Competitive Service Status for Indians (Prerulemaking Activity)
3. Review of Qualification Standards for Indians in the Excepted Service in the Indian Health Service (Prerulemaking Activity)
4. Indian Health Service (IHS) Eligibility Criteria (Prerulemaking Activity)
5. Increase in Medicaid Reimbursement for Services Delivered to Indians (Prerulemaking Activity)

-3-

6. Options for Indian Health Service (IHS) Billing for the Cost of Care Provided by IHS (Prerulemaking Activity)
7. Funding of Contracts under P.L. 95-398 (Self Determination and Educational Assistance Act) (Prerulemaking Activity)

Faye Iudicello indicated that OMB would not expect to include the following six items in the Administration's Regulatory Plan and the agency may wish to reconsider the plan to develop any regulations in these areas:

1. Organ Transplant Program (Prerulemaking Activity)
2. Reconceptualization of Shortage Area Designation (Prerulemaking Activity)
3. Health Maintenance Organizations Program Review (Prerulemaking Activity)
4. Relationship Between Federal Programs and Changes in Infant Mortality Rate/Low Birth Weight (Prerulemaking Activity)
5. Standards for the Accreditation of Education Programs for the Credentialing of Radiologic Personnel (Final Rule)
6. Reasonable Volume of Uncompensated Services to Persons Unable to Pay (Hill-Burton -- Nursing Homes) (Prerulemaking Activity)

We should probably not object to the OMB decision on the first four items listed above in the Administration's Regulatory Plan. These items were included in the HRSA Regulatory Plan because of the uncertainty as to the activities of interest to OMB. HRSA only plans to study these items at this point and has no plans to issue regulation regarding these during the period covered by the Regulatory Plan.

We have already submitted a final rule regarding the radiological health personnel standards to ES/OS. The regulations were developed in response to a statutory requirement sponsored by Senator Jennings Randolph who has subsequently retired from Congress; no current congressperson has the same level of interest in pursuing this issue. A legislative proposal is being considered to seek repeal of this statutory requirement. Regulation of radiologic health personnel and their training programs is traditionally a State, not Federal, function.

-4-

We have a commitment to submit a report to Congress dealing with the issue of whether nursing homes should be treated differently from hospitals in their uncompensated care obligations. The report will not commit the Department to issuing regulations, but OMB has eliminated our options.

HRSA has made a commitment to submit revised information regarding the seven items that OMB indicated that they would most likely include in the Administration's Regulatory Plan to ES/OS by March 26. In addition, HRSA will submit revised information concerning the other seven items that OMB indicated that HRSA may wish to pursue if the agency determines to pursue these items.

We will provide you with additional information concerning OMB's review of the other portions of the PHS Regulatory Plan as this information becomes available.

Bob Spencer

Bob Spencer
PHS Regulations Officer

Mr. SIKORSKI. Thank you, Mr. Bass.

On that last point, just as an aside, reading through the various Law Review articles on OMB and not only the editing power but the paperwork review authorities and the others, OMB is the most powerful part of the Federal Government, and almost all of its actions are done in secret, beyond public scrutiny.

The comment keeps coming up that this administrative part of our Government, the fourth branch, is not owned by whoever wins the presidential election and it is not controlled, it is not meant to and isn't under the Constitution or the laws, controlled by the President, it is influenced by the judiciary and specifically in detail through budgeting as well as through statute, part of the legislative branch of Government as well, it is a joint or cooperative venture. The point is made by the commentators repeatedly that OMB is the means by which this fourth branch of Government is being brought under the executive office, the presidential office.

As an aside, I failed to mention earlier, in fact, her brilliance silhouetted by the window. I didn't identify Congresswoman Schroeder who is here and has a meeting to attend on Armed Services. She came to greet Mr. Darman.

Mr. Bass, you raised just a few of the issues that OMB has involved itself in. They include everything from Reye's syndrome to toxic shock syndrome, hazards communication, to ethylene oxide, asbestos, to lead in gasoline and ceramics, fuel economies, standards to tire quality grading, community right to know, infant mortality, and these are just a few. The point is that this control—and focusing now just on the editing aspect of testimony and press statements and other things—affects what the Government is doing or not doing about a host of things that are as personal as the air we breathe or as intimate as the things that come in contact with our babies or affect pregnant women on a daily, repeated basis.

With that understanding, I would like to ask you about the qualifications of the people who are editing the testimony of scientists, researchers, doctors, medical professionals, health professionals, who are charged with and paid by the taxpayers to protect the health and safety of 245 million Americans. Who are these fourth and fifth level examiners? What is their background?

Mr. BASS. I almost want to answer in two ways. Let me specifically answer your question and say something a little bit broader. There is no doubt that the real expertise resides in agencies. Let's start with that point of view.

Agency personnel have been working on an issue for quite some time. In most cases, agencies, before they go public with something, end up doing some kind of external review, often called peer review panels. There is considerable money spent, considerable time, and considerable expertise brought to bear on those. They are often modified; they are revamped in many ways. These things are not done willy-nilly. Agencies have political appointees that clear all of this. It is not done in a vacuum.

Now once it goes to OMB, who gets it, and how is the influence exerted? As it goes to what are called OMB desk officers, in this case it is desk officers within the Office of Information and Regula-

tory Affairs. They are anyone from a GS-11 to, say, a GS-13. Some of those people have come to OMB from agencies. However, many have not.

The training of those desk officers is, at best, haphazard. Oftentimes when a desk officer takes the position at OMB, they are given a manual and told, "Go to it; make your decisions." In other cases, once a decision is made, if it is an extremely highly political one, it goes up to the deputy administrator and then as far as the head of the Office of Information and Regulatory Affairs, and, in certain cases, such as what happened a few weeks ago, even the OMB Director—in this case, Dick Darman—made a decision. So, depending on the political nature of something, it can go up very high.

But I want to emphasize that these desk officers have very little training, in some cases have some expertise, but not necessarily a lot, and are overseeing an enormous array of agency activity from regulation to paperwork, which requires literally a whole agency like HHS or EPA to handle.

Mr. SIKORSKI. That is the point.

In the Dr. Hansen incident, you have the head of the Goddard Space Institute, who is an expert, as I recall, in the modeling of these global weather patterns and who has been involved in this, not without some controversy, but involved in this area for years, whose testimony was changed, whose scientific conclusions as a scientist were changed by someone at OMB.

The response, when this triggered a controversy, from the President's press secretary was that it was done routinely, which should be bothersome to the American public and the press, and certainly Congress, whose testimony is fabricated for congressional review, and, secondly, was done by just a fourth or fifth level person over at OMB. The rationale was that it was to make the point that scientists are in disagreement.

My question is, who is this fourth or fifth level examiner at OMB, and what qualifications does he or she have to change the scientific testimony of the head of the Goddard Space Institute?

The fact is that they are not scientists. On the asbestos issue, we had a man named Ginsburg—who received some notoriety more recently because of his failed nomination for the highest court in the land—who was at OMB, and he, with other economists and lawyers, were making health and scientific decisions affecting the asbestos in the air that we are breathing in schools and made an analysis that a human life was worth \$22,500.

So there are very few of these people, in the first place, compared to the agencies that are producing this work product. Is that correct?

Mr. BASS. Mr. Chairman, let me make one important distinction and point here. Even taking your comment to its logical conclusion, if OMB came back and said, "We'll put scientists in," and if the case was, say, that the Hansen testimony was reviewed by a scientist, that does not solve the problem. The problem is that an external White House agency is not where the decision-making should be. It should be residing back in the agency where the experts are. Even if OMB decides, as in some cases it does do, to send out for

external expertise, that violates a process which agencies go through and rigorously uphold.

Mr. SIKORSKI. And the statutory design established for agencies that are set up pursuant to statute, not pursuant to executive order.

Mr. BASS. That is correct.

Mr. SIKORSKI. To fulfill functions that are set out in statute—laws that are passed by Congress and signed by the President and budgeted through the legislative process. Isn't that correct?

Mr. BASS. That is correct.

There is no doubt that there is a question of expertise here. I just don't want the conclusion to be, all we need are more experts at OMB.

Mr. SIKORSKI. That is not my conclusion. I just want to point out that the people that are doing the editing aren't qualified to do the editing, and the structure of Government is not designed to have them doing that stuff in the first place, and they don't have the resources.

In the second place, they don't have the numbers, and they don't have the budget to be experts in the areas that they are editing. The fact that they can't come up here and testify today about what they are doing—they are not qualified to do that but, on the other hand, are viewed as qualified to change the testimony of the head of the Goddard Institute—is absolutely crazy, and, beyond that, it is done in secret, and that is the final point. We don't know whom they are talking to, we don't know whom they were employed with before, whom they are going to go in employment with, what kind of back door openings to industry are being made, and we can't even raise those questions because the process is relatively secret.

Mr. BASS. Mr. Chairman, one other point, to put this all in the context of where we are today, we have a new President, many of these examples occurred under a prior administration, and there has been much comment about it being a kinder, gentler administration. I think the issues that you just brought up are process concerns, are practical concerns. Regardless of whether you have a mean or whether you have a kinder, gentler administration, these are problems that must be fixed and dealt with in an orderly manner so that these kinds of issues do not have even the potential for occurring.

Mr. SIKORSKI. Let me ask you this. Say you got these people over there, this desk officer, and the numbers and qualifications we are getting from the Office of Management and Budget. If we have to have another hearing, we will have it. If not, we will put it into the record. I expect that we will want to have Mr. Darman up on just this little slice of life at OMB, the editing process, how extensive it is, does it include press statement, speeches, and other things, who is doing it and under what authority, and the resources that are available at OMB compared to the people that are providing the testimony?

But focusing on the impact on morale after this process has occurred, what recourse does someone internally have to take their testimony to someone above this overseer at OMB?

Mr. BASS. In almost all these hearings, not only the legislative clearance but on the regulatory issue and the information issues,

there is very little formal mechanism for any kind of appeals process.

Mr. SIKORSKI. In fact, on the editing, there is no formal mechanism.

Mr. BASS. That is correct.

Mr. SIKORSKI. And they have no appeal process. At best, they can try to go to Mr. Darman or someone above this budget officer. But because the system is so informal in the first place and so secret in the second place, there is really no recourse after the editing has been made other than to publicize that and say, as Dr. Hansen did, "That's not my conclusion, that's someone else's conclusion."

Mr. BASS. The only place where that is not 100 percent accurate is in the case of independent regulatory agencies, and I am not speaking now to testimony but, rather, about their clearance of information activities.

Mr. SIKORSKI. Right.

Mr. BASS. They can override OMB, but let me be clear that that is very unusual that an agency will override OMB, in part because of the budgetary control.

Mr. SIKORSKI. Someone commented, there are three parts of Government, one is money, one is staff, and one is regulation, and OMB controls all three. This hearing is focusing on the fourth part, dissemination of information, specifically congressional testimony but other information as well, and OMB controls that as well.

Do you have any concluding comments on the issue of morale affecting Federal employees—this editing process?

Mr. BASS. The concern will always be whether agencies can speak their mind.

I also want to draw a distinction, at least in terms of this clearance process we are now talking about in editing, the distinction, as Dr. Hansen did, between policy and science. I find that there is a very gray area where policy ends and science begins.

In any science, there are policy issues being debated. I am a social scientist, and if I put my terms in scientific terms I hope to have a leg up on everyone else. But, frankly, within those scientific terms there is a great deal of policy debate. So it is very difficult for me to draw a clean line where something starts and where something stops.

Mr. SIKORSKI. Evidently it is difficult within the administration, too, when it throws out a study on infant mortality as being inconsistent with the policies and priorities of the administration. It is gray for a lot of people.

Thank you, Mr. Bass, very much.

Our next witness is Mr. William Schultz, who is a staff attorney at the Public Citizen litigation group. As many of you know, Public Citizen is the consumer advocacy group founded by Ralph Nader in 1971. Mr. Schultz is here this morning to talk about his experiences in dealing with OMB as the office has affected employees at the Food and Drug Administration.

Mr. Schultz, thank you for coming. We know it was on short notice. We appreciate your efforts at being here. We would ask you to summarize your testimony in 10 minutes.

STATEMENT OF WILLIAM SCHULTZ, ATTORNEY, PUBLIC CITIZEN

Mr. SCHULTZ. Thank you, Mr. Chairman.

First, I want to compliment you and your staff for pursuing this important issue. OMB review has, in my opinion, many negative impacts on the quality and effectiveness of Government, and certainly one of the most important of those is the impact on the morale of Government employees. Nowhere is this more true than of scientists.

I have been practicing public interest law in Washington for about 13 years, specializing in the area of food and drug law, and I have seen the Food and Drug Administration change from an agency that operated pretty much independently into an agency that has two levels of political review after a decision is made.

In the mid and late 1970's, as before that time, the Commissioner of the FDA made virtually every decision. I can think of only one or two instances where an FDA decision was even reviewed at HHS, the Department of Health and Human Services, or HEW, as it was known before that. Of course, there was no review by OMB.

The agency's decisions are largely scientifically based, and, again, in the mid-1970's and before, in the late 1970's, the Secretary of HHS had delegated virtually all authority to the maximum extent permitted by law to the Commissioner of the Food and Drug Administration.

When the Reagan administration came into office in 1981, it made two significant changes in this regard. First of all, it issued a regulation that is found at 21 Code of Federal Regulations, section 5.11, that withdrew the delegation from the Secretary of HHS to the Commissioner of FDA. Since that time, every important FDA decision has been reviewed at the office of the Secretary of HHS. The second change, of course, is Executive Order 12291, which requires OMB review of all significant regulations.

The result is that individuals with little or no scientific training at HHS and OMB have frequently reversed decisions made by FDA scientists, and they have often done it on scientific grounds. I would like to spend the remainder of my testimony discussing several examples.

The first one is raw milk, or unpasteurized milk. After 10 years of study, the Food and Drug Administration in the early 1980's wrote a proposed regulation to ban the shipment of unpasteurized milk in interstate commerce. The reason for the ban was the risk of salmonella, a deadly micro-organism. There was no policy question involved. Raw milk is dangerous, and the FDA concluded it was required under law to ban it. Yet the decision was reversed at the instigation of a single HHS employee, and it was only after a court held HHS's decision to be arbitrary and capricious that the FDA went ahead and banned raw milk.

The second example is the one of aspirin and Reye's syndrome. In November 1981, the Centers for Disease Control confirmed the connection between aspirin and Reye's syndrome. They concluded that children with 'flu or chickenpox who took aspirin had an increased risk of getting Reye's syndrome. Reye's syndrome is a rare but extremely serious disease. It afflicts somewhere between several hundred and a thousand children each year, and a third of them

die. Most of the remaining who are afflicted suffer very serious brain damage.

In 1981, the Centers for Disease Control declared that aspirin should be avoided by children who had 'flu or chickenpox and, that it should be avoided altogether by children during the 'flu season.

The FDA studied the evidence, and, in June of 1982, the Secretary of HHS announced a proposed regulation that would have required a label on aspirin. The idea was to use the Government's authority to require the aspirin makers to tell parents, through a label, not to give their children aspirin under these conditions.

Subsequently, OMB met with representatives from the Aspirin Foundation, a trade association for the aspirin industry. It then directed the Secretary of HHS to kill the regulation pending further study. The regulation was delayed for about four years. Ultimately, a label was required, but that was after about 3,000 serious injuries from Reye's syndrome and as many as 1,000 deaths. These were all needless, and I submit that the executive branch of the Government really has to share a lot of the responsibility for these deaths since it denied the parents of these children the information to which they were entitled under law.

The third example that I want to talk about is the example of color additives. As the committee knows, the Delaney clause requires the Food and Drug Administration to ban color additives that induce cancer in animals. This is a law that has been on the books for 29 years. It is a law that makes particular sense in the area of color additives, since color additives serve no useful or beneficial or health-related purpose; they are used only to color foods, drugs, and cosmetics.

In 1983, after 23 years of study, the FDA scientists concluded that a color additive, Red No. 19, caused cancer in laboratory animals. The logical conclusion that followed from that was that Red No. 19 had to be banned under the Delaney clause. A recommendation to ban the dye was subsequently approved by the Commissioner of the Food and Drug Administration, a Commissioner who, incidentally, had been appointed by the Secretary of HHS and who was a political appointee.

Subsequently, other Reagan administration FDA Commissioners made the same decision with respect to five additional color additives—Red No. 3; Red No. 8; Red No. 9; Red No. 37; and Orange No. 17.

Meanwhile, while this was going on, industry was holding numerous meetings with the political appointees at HHS and OMB, and, subsequently, the Commissioner of FDA was reversed. Four of the color additives were approved under a new interpretation of the Delaney clause, the first time ever that the FDA had approved a color additive or food additive found to cause cancer in animals. We subsequently sued the agency, and the FDA was reversed in a unanimous decision by the D.C. Circuit called *Public Citizen v. Young*. The opinion, incidentally, written by Judge Williams, an appointee of President Reagan.

I say all that to say this was not a close question. It is nice to win cases, but this was not a hard case. The court said it was a straightforward question of law. The law, the Delaney clause, said what everybody had always thought it said, which is that the FDA

is required to ban color additives that its scientists have found induce cancer in animals.

Today, five of the six color additives have been banned, and the sixth one, Red No. 3, is scheduled to be banned on June 30 of this year.

I could tell the committee a similar story with respect to numerous other regulations that the FDA has submitted to the Office of Management and Budget over the past nine years. The story is the same and ongoing with respect to tampons and toxic shock syndrome. The FDA has been trying for a number of years to require a label on tampons to inform women about how absorbent tampons are so that they can use the least absorbent tampon and protect from toxic shock syndrome.

The FDA proposed regulation that was drafted in June 1987 is still pending at OMB. The story is the same and ongoing with respect to the regulation of methylene chloride in cosmetics. That issue is currently pending at OMB. The story was similar with respect to patient package inserts, infant formula, and other numerous products regulated by FDA.

One other example that I would like to dwell on for a minute on is over-the-counter drugs, because I think it shows how truly silly OMB review is.

The FDA, since 1972, has been reviewing over-the-counter drug ingredients for safety and effectiveness. This is a massive project conducted by, at various times, between 40 and 100 FDA employees. Essentially, what those employees do is to review a category of over-the-counter drugs—for example, cough/cold ingredients or headache ingredients. They then review the ingredients in the product category—such as the ingredient in aspirin or a particular anti-histamine. The FDA scientists examine the scientific studies that support the industry's claims that the ingredient is safe and effective: the studies that industry claims show that aspirin helps to cure headaches or that an anti-histamine is effective for colds or allergies. Then they make a list; they list the ingredient, and they designate it in one of three categories. It is either safe and effective, it is not safe and effective, or more study is needed.

I go through this to emphasize the purely scientific nature of this effort. The document, which can be 70 or 100 Federal Register pages at times, contains analysis of scientific studies. It is then sent over to OMB for its review.

The idea of an OMB desk officer with no experience in this area reviewing and second-guessing the work of tens or more FDA employees on this kind of technical issue really borders on the ridiculous, and the impact of this in numerous areas is not only to reverse FDA decisions but often, and just as serious, to delay them. The impact of delay is, in some cases, just as serious as the impact of a reversal on the morale of agency employees. From their point of view, they work on an issue—the FDA is slow anyway; public interest groups like ours are always complaining about how slow the FDA is—the work is finally done; it is approved at every level; it then gets to HHS, and particularly OMB, and it is delayed even more, in some cases reversed.

I would be happy to answer any questions.

Mr. SIKORSKI. Thank you.

On that point, Mr. Schultz, impact on those people over there, both the delay—I guess there are a couple of questions swimming around here. One is that the OMB sets the budget and the direction, research, and rule-making at the agency, so these professionals know eventually where their staff complement and their money is going to be decided. Are they the same people, the same desk officers, that are affecting the regulatory process, the testimony, and the public information process?

Mr. SCHULTZ. I think in some cases yes.

From the FDA's position, OMB is almost a blur.

Mr. SIKORSKI. Kind of like in the Wizard of Oz: "OMB," and the curtains shake, and the lightning is triggered, and thunder occurs, and it's a grand, eloquent phrase?

Mr. SCHULTZ. OMB operates in some very clever ways.

Mr. SIKORSKI. You see, I am focusing on the impact on the work force.

Mr. SCHULTZ. Right. The point I want to make is that OMB deals with fairly high level people at FDA, so they will typically deal with the Commissioner or maybe slightly below that level. So from the point of view of the researcher or the typical FDA employee, it is just OMB, it is not a particular officer at OMB, and they often don't really know where the Commissioner's decision stops and OMB's decision starts.

Mr. SIKORSKI. So it goes up the line to the Commissioner, assistant commissioner, and then they take it over to the wizard and the curtains, and there it is transformed, or delayed, or changed.

But the impact you were saying—that is why I interrupted—the impact on the work force is many times the same. You have got people with limited resources who are beaten up by the public and by Public Citizen and others for not doing what they should be doing.

Mr. SCHULTZ. That's right.

Mr. SIKORSKI. And I sense in many cases they understand that as well and feel the same, but they are within the chain of command, and they are responsible, so they do what their duty tells them to do. Then it gets bounced back. How do they feel? What is the impact there? What does it mean for professional reputations and longevity of service in the Federal work force?

Mr. SCHULTZ. I think it is devastating. I think one of the real legacies of the Reagan administration—I hope this isn't true of the Bush administration, but we will see—is going to be on the morale of agency employees. It is not just scientists, it is true of lawyers and other employees as well, and it is almost worse because you see these decisions bounce back and you don't even really know why. It was described to me by FDA employees as the black hole. They make a decision, they do all this work, it goes somewhere, they don't know where, and they don't hear about it for a long time, and then it is changed with really no explanation. It is absolutely devastating.

When a scientist or a lawyer comes to work for FDA, he or she don't go there for the money; they don't go there because they get a lot of public credit for their work; they go there to do public service. FDA employees understand that there is a lot of policy involved in FDA decisions; they can understand when their decisions

are reversed on policy grounds; and they have to argue policy often within the agency. But when they have convinced the people at the agency, and it really is pretty much a scientific issue anyway, and then it is reversed by political appointees at HHS or OMB, I think it is extremely discouraging. The long-run impact is very serious.

Mr. SIKORSKI. Thank you very much.

Mr. SCHULTZ. You are welcome.

Mr. SIKORSKI. Our last witness is a senior scientist at EPA and is president of the local NFFE union chapter at EPA headquarters, Bill Hirzy. Bill has testified before the subcommittee before and has been a great help to us. We thank Mr. Schultz, Mr. Bass, and Mr. Hirzy for their assistance in this ongoing effort by the subcommittee, looking at this process and its impact on Federal employees.

Mr. Hirzy, we look forward to your testimony. We appreciate your input on short notice. Your testimony is excellent. We ask you to carry forward for 10 minutes, and then we will ask a few questions.

STATEMENT OF J. WILLIAM HIRZY, PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES UNION, LOCAL 2050, U.S. ENVIRONMENTAL PROTECTION AGENCY HEADQUARTERS

Mr. HIRZY. Thank you, Mr. Chairman. I appreciate the opportunity to testify on the impact on employee morale of certain activities of the Office of Management and Budget that relate to EPA and its mission.

As you know, our union represents the professional bargaining unit people at EPA headquarters. Again, let me say that my material was gathered on rather short notice with limited resources. I owe to my successor, Dr. Robert Carton, in this office a great deal of credit for pulling this information together on short notice.

I have arranged the testimony to cover four kinds of OMB influences on science and employee morale at EPA. The first is the involvement in noneconomic assessments—that is, OMB reviewing the scientific or engineering content of rules. The second is OMB control of access to data that are required for scientific assessments. The third is OMB advising against consideration of science in rule-making, and the fourth are the sub rosa impacts that are not easily classified—that is, the delaying of reviews, consulting interested parties off the record, and other undocumentable impacts on management decision-making criteria that show up, for instance, in an agency work group where the chair will respond to some innovative idea or proposal with, "Hey, that will never get by OMB."

There are two examples I wanted to bring forward on OMB's intrusion into scientific and engineering assessments. One is the proposed rule on light-duty truck hydrocarbon and carbon monoxide emissions, the other a proposed suspension of registration of Alacolor.

In the first, OMB questioned the conclusions in the rule package concerning the severity of immune system effects and irreversible lung damage related to ozone produced as a result of hydrocarbon emissions. OMB challenged the scientific conclusions and held that

the conditions of the study were a worst case scenario designed to frighten the public. On rereview by the agency scientists, it turns out that that was not correct, that in fact the conditions were for normal atmospheric conditions.

In the Alaclor case, a decision to suspend registration had been reached by agency scientists and management—and this is an important point I'd like to make, Mr. Chairman, that in many of these instances, as my colleagues who have testified here previously pointed out, it is not only the staff people but management who have concurred in some of these rules that have suffered the wrath of OMB.

This proposed suspension of registration had been based on carcinogenicity data on the chemical. It has been found to induce tumors, for instance, in less than six months in test animals and to be carcinogenic at all levels tested down to quite low levels. But OMB refused to clear the action based on the conclusion that there just wasn't enough evidence to support a suspension.

As a result of that action, however, the agency did have to continue moving to protect the public from exposure to Alaclor, and the Office of Drinking Water then proposed a regulation requiring Alaclor to be removed from ground water used to supply drinking water systems, and this obviously then transferred a substantial economic burden from the manufacturer to the public, and that burden is estimated at several millions of dollars a year.

When dedicated civil servants who are sworn to protect the public interest—and, again, staff and management I'm talking about—see this kind of thing, it sometimes drives them out of the service, or it drives them out of their minds with rage. It colors their action in subsequent work. The attitude of, "Why bust my tail doing a first-rate job when it is just going to get torpedoed down the road by OMB?"—that attitude develops.

Another pernicious influence of OMB on the agency, its mission, and the morale of the staff is its ability to limit access to information. There may have been incidents of overly broad information requests in EPA's history, and, as my written testimony shows, I was involved in one of those one time when I was in the chemical industry myself. But I think that the proper way to control that problem is through the rule-making process. Affected parties can challenge the agency's need for information and pursue the matter in ways that are prescribed by the Congress in law.

But under this information budget system, with the agency's information acquisition limit set by OMB, choices have to be made among which programs will get how much information, and the wrong questions get asked. Instead of, "What do we need to know about this problem in order to deal with it?" we have to face the question of, "What is left in the budget, and how can we parcel it out among all the programs needing information?"

It is like being sick and telling the doctor that all he can ask you is your name and take your temperature, and you say to him, "No other questions, please, Doc." A good doctor will tell you to take your illness some place else if that is the condition placed on him, and so, in the same light, environmental protection professionals look askance at being arbitrarily limited in this way.

This can best be characterized as part of the low-intensity OMB frustration factor in the civil service that gradually eats away at employee morale. Right now, there are limits like this being placed in the path of getting out a good rule on biotechnology, and, again, this is just one example that surfaced very quickly for us without really any search at all.

The third type of impact is when OMB advises the agency not to consider science at all in rule-making. In the matter of setting a primary drinking water standard for fluoride—and I welcome my colleague from the American Dental Association who is here to hear this testimony this morning—OMB wrote in a letter to EPA on April 26, 1985, that setting a secondary, unenforceable standard for fluoride was preferred: "In our view, it would avoid the difficulty of searching for an adverse health effect."

Science, according to OMB in this matter, is only useful when it is easy, and it sends a signal to the staff that cookbook science is not only acceptable but it is preferred, and you can imagine what effect a signal like that has on the morale of the staff and on the quality of the work that is delivered to the public and also on encouraging first-rate scientists to jump ship and go to work some place else.

The most difficult to document, but I think the most insidious and most damaging way OMB influences the agency and its employees, is the black hole technique. This is the technique that involves stalling a proposed rule sent in good faith to OMB for review but, in reality, is sent straight into a black or a gray hole from which it has great difficulty emerging, if at all. The reasons for rules being lost in space like this vary, as do the techniques for retrieving them.

The trihalomethanes drinking water rule languished in OMB for no apparent reason, and finally, out of frustration, you in Congress threatened to cut off funding for OMB, and your efforts miraculously caused that rule to reappear, and we in the staff appreciate your efforts in making our work effective.

In a similar case, the drinking water rule on radio-nuclides disappeared for six months at OMB. Staff and managers visited OMB trying to pry that loose and to find out what the reason was, and, basically, what OMB was saying is that they wanted a specific, most likely risk number for exposure to radio-nuclides, and the science prescribed quite clearly that you couldn't do it that way, you had to present a range of risk.

A very sagacious manager told the scientist who was involved, as he relayed the story to me, "Relax, Rick, just wait, and this is going to take care of itself," and sooner or later it did. But a price is paid for this kind of thing, again, in terms of this frustration factor mentioned earlier, and that price is paid both by staff and management.

I'd end the examples of this kind of black hole technique with our union's first run-in with OMB back in February 1985. That has been alluded to by the previous witnesses.

On February 1, 1985, the branch chief who was in charge of the TSCA asbestos ban/phase-down rules came storming into my office demanding to know what the union was going to do about OMB interference in these rules. The basis for his wrath was his presence

at a press conference, at which I also was in attendance, at which the deputy administrator, Mr. Barnes, had announced that the rules were going to be delayed, held up, and the risk control efforts were going to be referred to OSHA and CPSC for action.

So I was a little puzzled at Mr. Gross's wrath about OMB involvement, because Mr. Barnes hadn't mentioned OMB, and, in fact, a reporter asked a question if OMB's influence were at work in this matter and Mr. Barnes specifically denied it.

Mr. Gross went on to fill me in on the background of the problem, and, to make a long story short, we asked Bob Eckhardt, the father of TSCA here in Congress and former Congressman from the 8th District of Texas, to help us out.

In short order, Congress's displeasure with this situation was communicated to EPA, and an investigation occurred—again, which has been alluded to by previous witnesses—and in that investigation it was learned, among other things, that OMB had held secret, closed meetings with interested parties, after which it had put the screws on EPA to back off from regulating under TSCA.

A memorandum of understanding between EPA and OMB was eventually executed as a result of this, and in that MOU OMB agreed that no such secret meetings would be held in these kinds of circumstances in the future. We do take some pride in our part in this accomplishment.

I would like to conclude with reading just a brief part of the letter that we sent to Lee Thomas, who was administrator at that point, when we first learned of OMB's involvement in this incident. I would like to make that reading, because it does speak in terms quite clear and unequivocal about the pernicious impact of this sort of machination on our morale and our view of the agency's mission.

The letter says:

The undersigned members of your staff—

this is dated February 14, 1985—

Are deeply concerned about the agency's announcement on February 1 that we have changed course on regulating asbestos under the Toxic Substances Control Act. This recent retreat on regulating asbestos is, at its core, a working conditions issue for us. We take our work in public health and environmental protection and our oath to faithfully serve the public interest very seriously. The retreat on asbestos makes a joke of our work and represents a threat to the public interest.

Our work becomes a hollow gesture of placating public anxiety about risks when it is subverted. Scientific and legal analyses of the risks from asbestos were carefully done, including analysis of the authorities of OSHA and CPSC to control the risk. The public needs to know, as we at EPA do, that both OSHA and CPSC have had the authority all along to regulate the risks that are the subject of these two rules, and consultation among the three agencies led to a determination by all parties that EPA's rules would be complementary to any action the other two might take. Furthermore, OSHA has already made clear that the level of risk control that would be applied short of a ban would still be inadequate to protect public health to an acceptable degree.

Thus, a great deal of first rate professional work by EPA staff and management, including an explicit analysis of the implications of section 9 of TSCA, has been declared invalid by the retreat. It is an outrage.

It is outrageous, especially because no explanation worthy of the name has been given. The assertion made on February 1 that section 9 of TSCA had just been discovered to apply in this case is an insult to our intelligence and to the public's.

Failure to give a clear explanation of how this risk control decision was made leaves us demoralized and questioning the value of public service work in risk con-

trol, and it calls into question the feasibility of continuing "fish bowl" decision-making on risk control.

If all future decisions on risk control are to be made by OMB in private consultations with special interests who are not identified in the public record, what is the meaning of our work? What is the public getting for the money spent at EPA? Are we to be simply a preliminary screening group whose task it is to present options to OMB and its unknown clients and then await their decisions and execute them?

We did not come to work for EPA to do that, and neither, we think, did you.

That concludes my testimony, Mr. Chairman.

Mr. SIKORSKI. Thank you, Mr. Hirzy. Very powerful.

We have heard a lot about OMB's role in adversely affecting employee morale, and it is very disturbing. On a side issue which the Civil Service Subcommittee is looking at, the impact of political appointees in the process, are you aware of instances where Federal employees at EPA have encountered frustrations, similar to what you described with OMB, coming out of their dealings with people at EPA?

Mr. HIRZY. I think probably the clearest and sharpest, in my mind right now, incident of this type relates to the incident that we have had going on at EPA for some time, the intoxication of our people by carpet that was introduced in 1987 and 1988.

Mr. SIKORSKI. This is the sick building problem?

Mr. HIRZY. The sick building/toxic carpet problem.

The decisions on that issue had been made by the political appointees, principally Mr. Grizzle, to not remove that carpet, and the philosophy behind that decision has cascaded down into the Program Office. Specifically, I was engaged in a conversation two days ago with my supervisor in my branch and the section chief involved in the program, which the agency has started, looking at this problem on a national level.

I have been banned from attending work group meetings, by the way, because of my interest and involvement in this from the union perspective, told by the section chief that I have a different sense of urgency about this problem than management does.

The point being, the killer in this one was, in the discussion we had two days ago, again, dealing with the question of, when are we going to be able to take action on this problem? I have been getting phone calls and letters from members of the public almost on a daily basis complaining about being made ill from carpet having been brought into the home, and I raised this with my branch chief: "What are we going to do about this, Larry, if we have to wait for five years before we take action?" This is where the pernicious influence of the political philosophy has come down.

It has infected the Program Office to the effect that my branch chief looked at me with a straight face and said, "Well, we're not a public health agency, you know. Somebody else can take care of this problem." It is further testimony to that influence that it didn't strike me until five minutes or so after I walked out of that meeting, the import of what he had said, that we are not a public health agency. Since then, I have been in a great funk over that, and I am not sure how to deal with that except to keep the pressure up. So that is an example.

Mr. SIKORSKI. Moving back to the issue of the editing of the scientists who disagree with OMB's actions, either the editing or the rule-making process, where do they go for appeal?

Mr. HIRZY. There really isn't a formal place to go for appeal. What we have been trying to do as the union there is to stake out accomplishment of the agency's mission, in performance of professional grade work, as a working conditions issue and to serve as a rallying point for people who feel oppressed in this way by the administration. We then take action as appropriate.

For instance, in this carpet matter, we are about to file a petition under section 21 of TSCA to compel the agency to address certain data which so far they have refused to address, one reason for which, that has been given to me, is that they are afraid that somebody at the agency is going to get sued by some of our injured people. So we use our separate legal standing in ways that we can to apply pressure on the agency and to serve as a rallying point for people who feel they need some help in this matter.

Mr. SIKORSKI. If I understand, where the rubber meets the road for the Federal civil servant who is a higher level GS scientist, say, someone at EPA, who is there probably getting considerably less than they could make on the outside, without the kinds of assistance and support services and staff that they could get on the outside—we saw that in our investigation of the EPA in the Oversight and Investigations Subcommittee at Energy and Commerce six years ago under the Gorsuch-Burford rein.

What happens in, say, the editing situation is that their professional integrity, their reputation, the one thing they have that is important and immediate to their career, is directly affected.

Mr. HIRZY. That is right. It is challenged.

Mr. SIKORSKI. As is their reason for being in Government in the first place, their sense of public service, and you are telling us that they have no recourse, no appeal process, they either have to comment in public, as Dr. Hansen did, or eat the changes and feel concern about their reputation and have diminished respect for what they are doing in terms of public service.

Mr. HIRZY. That is right, and some just jump ship. This branch chief I referred to, Richard Gross, for instance, left the agency very shortly after this incident and now, I think, works for the State of Connecticut. We lose a lot of good people because of this.

Mr. SIKORSKI. Have you noticed any change in your dealings with OMB under the new administration, besides hope?

Mr. HIRZY. I am aware that this memorandum of understanding has been invoked from time to time, and occasionally EPA has been notified of meetings that OMB is going to have and that the agency has declined to send anybody. So from the standpoint of the memorandum of understanding, things have gotten better, I think, a bit since 1985. Again, the amount of time we were able to spend on digging into this matter, appearing for this testimony today, was rather limited, so I would be happy to do further investigation or to help your staff look into those kinds of questions.

Mr. SIKORSKI. Good.

Mr. Hirzy, Mr. Schultz, Mr. Bass, thank you very much.

The Office of Management and Budget has come to control the fourth branch of Government, the agencies within our Government, which are not to be intended by the Constitution to be controlled by the person who wins the presidential election but ruled by laws passed by Congress, initiated and signed by the President,

and judged by the judicial branch that control of this fourth branch of Government was what was intended in the Constitution, and it is the way it is supposed to work, can only work that way.

We have to have agencies which are operated in a professional and unbiased manner, not ideological and political manner, so Congress can be assured that the policies they set in statute are carried out as intended, so that the public is protected and get their dollars' worth of tax money.

Instead of being assured of accurate and unbiased information, we are forced to accept information secondhand, as we see this editing and conforming process being carried out by the Office of Management and Budget. Information we are getting has been processed by desk officers who often do not have the expertise to really judge the quality of the testimony that they are making scientists give. It is done by fourth or fifth level examiners who are unelected, in secret, without appeal or recourse for civil servants. It affects morale, it affects professional reputation, and it affects the sense of public service held by the civil servants who work for the taxpayers of the country.

This editing and conforming process of public commentary out of these agencies, viewed in light of the larger OMB control over dollars, staff complement, and regulation making, is devastating. I think it is best summarized by a comment made by our last witness when he said, "When dedicated civil servants, sworn to protect the public interest, see this kind of thing, it sometimes drives them out of the service or out of their minds with rage. It colors their actions and subsequent work. Why bust my tail doing a first-rate job, when it will just be torpedoed by OMB?"

The subcommittee is adjourned.

[Whereupon, at 11:05 p.m., the subcommittee was adjourned.]

[The letter which follows was received for inclusion in the record.]



May 16, 1989

The Honorable Gerry Sikorski
Chairman
Civil Service Subcommittee
House Post Office and Civil Service Committee
406 Cannon House Office Building
Washington, D.C. 20515

Dear ~~Chairman Sikorski~~ *Gerry*:

On behalf of the 275,000 members of the People For the American Way Action Fund, we are writing to express our concerns about OMB's continuing efforts to censor government employees. As a nonpartisan citizens organization dedicated to protecting First Amendment rights, we have challenged government censorship and championed citizens' and congressional access to information about government activities.

The upcoming hearings scheduled by the Subcommittee on Civil Service are certain to document OMB's extraordinary control over the federal government; its continuing interference with the rulemaking process on a diverse range of regulations in areas in which it has no expertise; and its manipulation of the federal bureaucracy. Such OMB actions not only undercut our democratic system, but also adversely affect the morale of civil servants.

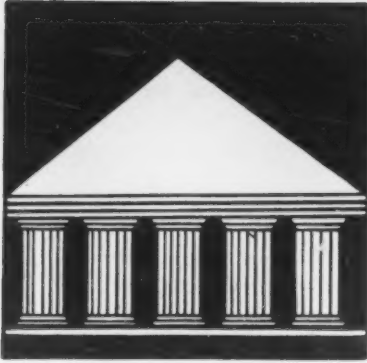
In the latest example, NASA's Dr. James Hansen testified before a Senate subcommittee last week that OMB officials, under the guise of reviewing congressional testimony, forced him to alter his scientific conclusions on global warming. We believe that OMB's actions in Dr. Hansen's case went beyond the editing of congressional testimony to the direct censorship of his scientific conclusions. Unfortunately, this incident is not the first time that OMB has engaged in placing controls on information.

Last year People For the American Way published Government Secrecy: Decisions Without Democracy, a compilation of recent government actions that restrict citizens' access to information. The report includes a section on OMB and its control of government information and regulations. We hope you find it useful as the subcommittee conducts its inquiry into OMB's censorship of government employees.

If you have questions or would like additional information about censorship and government information issues, please contact Melanne Verveer at 467-4999,

Sincerely,

John H. Buchanan, Jr.
Chairman



Chapter 8 Policy Powerhouse: The Office of Management And Budget

The Office of Management and Budget (OMB) is best known to Americans as former home to David Stockman, President Reagan's first OMB director. Stockman and the Reagan administration were able to transform OMB into one of the most powerful, yet secretive, agencies in the government. What makes a lesser known federal office the source of so much controversy and turbulence?

Despite its roots in the old Bureau of the Budget, which OMB superceded in 1970, OMB's role in the government is much broader than number crunching. In 1986, Congress stepped back to view OMB's dimensions. In the report that followed, *Office of Management and Budget: Evolving Roles and Issues*, Congress cited "95 statutes, 58 executive orders, 5 regulations and 51 circulars which reflect OMB's operational authorities."¹ The subjects covered by these measures are all-encompassing, from arms control² to water resources.³

The controversy and turbulence surrounding OMB has been about the exercise, growth, and secrecy of OMB's extraordinary control over the federal government. Congress acted to increase OMB's authority to improve the efficiency of the federal government. Then President Reagan expanded these new responsibilities beyond the intent, and consent, of Congress. During the Reagan administration OMB has been reinvented as the power base of the executive branch. As Congress observed in its study, OMB operates under the guise of a federal management agency, but it exhibits a "persistent confusion between management and control."⁴

OMB's control and its ability to manipulate the bureaucracy has led to increased government secrecy as both an end and a means. The opening for such activity came as the result of the Paperwork Reduction Act, passed by Congress to decrease wasteful paperwork volume in government, but President Reagan used OMB's powers under the Act in ways beyond the intended boundaries set by Congress. President Reagan granted OMB unprecedented authority to control the content and the volume of all government publications and to set the information collection policies of all federal agencies.⁵ The result: less information is available to fewer people about government.

As a means, President Reagan has endowed OMB with authority to rewrite federal regulations and studies, but the process has been conducted secretly. In 1985, disturbed that President Reagan had created a "superagency," Congressman John Dingell (D-MI), Chairman of the House Energy and Commerce Committee, stated:

While Congress expected everyone to play by the same rules, the OMB has rewritten the rules to give itself a special advantage. It engages in secret communications with agency officials and outside parties, leaving other interested parties on the sidelines watching a different game. A regulation may be blocked through OMB's clandestine intervention at the behest of a particular industry while limiting the presentation of opposing views by other industry representatives and the general public who might benefit from the proposed rule. This secret process is simply incompatible with a regulatory review process purportedly designed to promote rationality in decision making.⁶

OMB bypasses federal laws specifically enacted to provide citizens with knowledge of and access to government decision-making. In general, OMB reaches from behind the curtain of government into the lives of Americans. OMB is a subtle and complex force that makes unrestrained use of unaccountable power.

OMB CONTROL OF GOVERNMENT INFORMATION

The Reagan administration's action at OMB reflects a pattern throughout the government of reduced flow of information to the public. It seems that only the justification used in other areas of government has shifted, from "national security" to "cost/benefit." The consequences of secrecy remain the same: defeating the accountability of officials and agency activity, thwarting the checks and balances of our government, and undermining the democratic process. The Reagan administration assault against public service information began in 1981. It was significantly advanced in 1985 through the issuance of a comprehensive information management policy entitled OMB Circular A-130.⁷ Implementation of this policy has emboldened executive branch control of government publications, information collection and dissemination, and privatization of government printing. It has also undercut protections and rights guaranteed by law and decreased the effectiveness of government programs.

CONTROL OF GOVERNMENT PUBLICATIONS

The free flow of information in a democracy is essential to maintaining an informed citizenry, as well as helping people improve the quality of their lives. Government publications have historically been an important source of public information. These materials are relied upon by Americans to learn about their government, to be advised on health and safety matters, and to discover job and educational opportunities, as well as to become educated on other issues affecting their lives.

When President Reagan entered office in 1981, government publications were immediately targeted as an expendable resource. The president quickly expanded OMB's limited budgetary authority to review government publications⁸ and initiated a campaign to reduce government information as part of a "war on waste." Few would argue that government programs cannot be improved, but the emphasis in this case was not to create better information resources -- simply less. President Reagan kicked off the new OMB campaign by stating:

The federal Government is spending too much money on public relations, publicity, and advertising. Much of this waste consists of unnecessary and expensive films, magazines, and pamphlets.⁹

As the new "information czar," OMB established stringent controls on federal agencies. It declared a moratorium on new periodicals, pamphlets, and audiovisual products; required OMB review and approval of plans to publish such materials in the future; and mandated use of OMB publication control systems.¹⁰

OMB's publications policy terminated the availability of much information of public importance. In 1982, OMB issued its *List of Publications Terminated and Consolidated by Agency*, in which 2,000 publications were dropped.¹¹ One government publications librarian assessed the damage, stating:

Well-known government titles have ceased publication since the moratorium. Some of them can be verified among 2,000 titles announced in OMB's *List of Government Publications Terminated and Consolidated by Agency*. Others have simply failed to appear in print. No announcement was needed for reference librarians to notice that the annual Handbook of Labor Statistics failed to arrive on schedule in 1982, but it was not immediately apparent that it had ceased publication. It gradually became clear that numerous federal statistical sources had been terminated.¹²

OMB steamed ahead despite strong opposition by the nation's librarians and others. By 1984 a second OMB report claimed reduction of 3,848 government publications.¹³ One private, nonprofit group, OMB Watch, created to monitor the actions of OMB, determined that "over 43% of all federal publications were affected by the campaign against waste."¹⁴ The "waste" included publications on such wide ranging subjects of public concern as income taxes, drug abuse, automobile safety, and radioactive fallout. Some of these were:

- A Woman's Guide to Social Security
- Emergency Management
- Handbook of Labor Statistics
- Health Resources Statistics
- Housing and Urban Development Trends
- Oil Pollution Abstracts

Poison Control Center Bulletin
 The Car Book
 The Right To Read
 Unemployment Rates for State and Local Governments
 Your Housing Rights¹⁵

OMB's systematic efforts to cut back publications have continued to grow, snowballing into more comprehensive controls on information. In 1985, OMB issued an expanded "Government Publications" policy, increasing the frequency of OMB review of agency publication policy to every year, and expanding the types of materials subject to OMB scrutiny.¹⁶

CONTROL OF INFORMATION COLLECTION AND DISSEMINATION

OMB's control of government publications demonstrated its ability to block a direct communication channel between government and the public. However, OMB's control extends deep into all the information functions of federal agencies. The following is a list of ways in which this is accomplished. Records are maintained by agencies to help determine whether the government and others in society are complying with air safety, environmental, civil rights, or consumer protection laws. Information collected about specific government programs increases effectiveness in programs ranging from immigration reform to drug enforcement. Surveys are conducted by agencies to better administer government programs for public health care delivery, agriculture, or heat and fuel needs. All such information is especially important to concerned citizens and nonprofit groups that fill gaps in public policy by helping Congress formulate programs. OMB's control of information is strong evidence that policies about information are decisions about the very nature of society itself.

"PRIVATIZING" GOVERNMENT PRINTING

OMB action in March 1987 reveals its central role in determining whether government is responsible for informing its citizens and taxpayers. Bridging the areas of government publication and information policy are the very regulations that determine how information is printed and distributed.

For the Reagan administration, government printing is a primary target of its drive for "privatization," shifting functions of government to the commercial sector. Like other recent OMB stratagems, privatization has been pursued without considering its effect on government responsibilities. Government and commerce differ in many obvious ways. Foremost is the fact that public needs must be met efficiently but should not be conditioned upon profitability.

OMB's effort to privatize government information has been advanced in regulations that undercut the system created in law more than fifty years ago.¹⁷ That system requires federal printing to be performed by the Government Printing Office (GPO) under the auspices of the congressional Joint Committee on Printing. Congressman

Major Owens (D-NY), who was a professional librarian before entering Congress, in 1987 stated:

The benefits of this requirement as it has been implemented over the last 68 years has been invaluable: it has rid Government printing of the corruption with which it was once plagued, assured that printing is carried out as economically and efficiently as possible, provided universal public access to Government publications through the GPO-administered depository library system, and given Congress the powerful oversight tool it needs to preserve the free flow of Government information to the public.¹⁸

OMB's manipulation of federal regulations has, in this case, usurped these requirements supplanting benefits and reforms. OMB also permitted certain provisions to be issued as final rules without any opportunity for public comment. In particular, the new regulations remove the requirement that federal agencies obtain approval of the Joint Committee on Printing in Congress before transferring printing to commercial firms. Without centralized review, the government printing operation will be less efficient. While the government will be expected to print and publish, it will be both unable to plan and uncertain of personnel and budgetary needs. OMB has substituted "private" policy for public policy, dismantling the government's information infrastructure.

UNDERCUTTING PROTECTIONS AND RIGHTS

OMB's control of information collection affects the determination of whether government and others in society are complying with the law. OMB wields the power simply to tell agencies to stop collecting such information. The areas range widely from worker safety to fair housing opportunities. In most cases, OMB lacks the expertise to understand the importance of the information or the consequences of its disapproval.

OMB, for example, decreased assurances of a safe workplace for Americans in a January 1987 decision about information collection. Wood dust exposure in wood manufacturing factories has been linked to increased risks of nose, throat, and stomach cancer. The Department of Labor's Occupational Safety and Health Administration (OSHA) had recently stepped up its effort to determine the need for new worker protection regulations. In January 1987 OMB ordered OSHA to stop visiting wood and wood product manufacturers to make necessary evaluations, terming them "unapproved information collection."¹⁹

In another matter of occupational safety, OMB changed regulations dealing with mine workers' safety by scaling back safety record-keeping requirements. The Department of Labor's Mine Safety and Health Administration had sought to record defects in "self-propelled" mining equipment such as trucks and loaders. In 1984, the Mine Safety and Health Administration reported that between 1980 and 1983, 154 deaths and 10,000 injuries were attributable to accidents involving such equipment. This information ensures that defects are not overlooked, that necessary repairs are made, and that maintenance is

performed regularly. OMB, however, wanted to leave the responsibility up to the mining companies, requiring only a signed certification that inspections have occurred.²⁰

Compliance with civil rights laws has also been affected by OMB decisions that reduced the effectiveness of agencies responsible for stopping housing discrimination as well as those working to increase the number of minority-owned businesses in the United States. In 1985, OMB issued a decision barring the Veterans Administration and the Department of Housing and Urban Development (HUD) from collecting information that the two agencies use to remedy housing discrimination and administer civil rights programs. The information included the race, sex, and ethnic background of applicants for home mortgage insurance. One HUD official stated, "This is no casual effort by OMB, it's a concerted action. The surest way to stop [civil rights] enforcement is to remove information about who is in the programs."²¹ Pressure from a group of federal agencies and Congress forced OMB to reverse its decision.²²

Also in 1985, another OMB decision meant that compliance with the Equal Employment Opportunity laws by television stations throughout the country became less certain. OMB disapproved of Federal Communications Commission (FCC) annual reporting requirements on the race and sex of employees of cable television stations.²³

In another interference with the FCC, the administration moved towards achieving its goal of eliminating the Fairness Doctrine, the rule that broadcasters must give equal time to opposing views of controversial issues of public importance. OMB disapproved of FCC forms used to notify political candidates of their right to respond to TV and radio station editorials.²⁴ FCC compliance with the Fairness Doctrine was diminished, a goal which the administration championed throughout 1987.

DECREASING THE EFFECTIVENESS OF GOVERNMENT PROGRAMS

Information is collected by federal agencies to evaluate public needs and to improve the effectiveness and responsiveness of government programs. OMB, however, can choose to undermine these programs simply by disapproving of information collection.

Communities that suffer from chronically poor economic conditions or severe economic dislocation may be prevented from improving their lot in life. In June 1987, OMB disapproved of a plan by the Department of Commerce's Economic Development Administration to evaluate local technical assistance projects it has provided in the past. The systematic evaluations could have indicated the progress of such programs, as well as targeted areas of continuing need.²⁵

An effort to increase the utility of federal reports on medical policy and reviews of medical treatments and devices for nearly one million medical professionals was undercut by OMB in June 1987. The Food and Drug Administration (FDA) publishes its *Drug Bulletin* three to four times annually and it serves as an important forum for government and the medical community. Rapid medical advances and improvements in health care practices have raised important questions about the scope and utility of the

FDA publication. FDA decided to conduct its first readership survey in 15 years. OMB's disapproval of the survey forced FDA to continue making relatively uninformed editorial and budget decisions about the publication.²⁶

In 1985, the Indian Health Service tried to pursue a recommendation from Congress for improving its community-based outreach program for Native Americans. Congress has fought to maintain funding levels for the program despite President Reagan's efforts to phase it out. Congress recommended that the Indian Health Service set up a systematic evaluation of service delivery problems to the Native American communities. It was an attempt to resolve problems of geographic isolation, lack of access to health service facilities, and inadequate emergency services. OMB disapproved of the evaluation and information collection plan, referring in part to "apathetic respondent behavior."²⁷

These and other examples demonstrate OMB's ability to manipulate federal programs, undermine the intent of laws, and decrease the protections and rights of citizens. OMB's activities in these areas involve technical and often complex matters which the public cannot ordinarily understand or resolve. OMB's review process is inaccessible, and its rulings are difficult to challenge even by agencies which have expertise in the areas concerned.

OMB CONTROL OF GOVERNMENT REGULATIONS

It has been no secret that President Reagan has made deregulation of industry a priority of his presidency. However, two facts are virtually secret: (1) OMB is the administration's most subtle and powerful agent in reducing the number of government regulations; and (2) OMB uses its authority to rewrite regulations. Central to this authority has been the issuance of two executive orders by President Reagan, E.O. 12291 and 12498, which gave OMB the power to effectively control agency decisions.²⁸ Simply stated, since OMB controls federal regulations, OMB controls the laws. Regulations are the engines of federal law, determining the behavior of institutions and industries, and the strength of protections and rights.²⁹

OMB's role in shaping life in America has been permeated by secrecy. Its unaccountable power and unreviewable authority are an unsuitable environment for decision-making in a democracy. In 1986, a Senate investigation of OMB's interference with agency regulations reached the following conclusions about the impact of President Reagan's expansion of OMB's authority:

Executive Orders 12291 and 12498 together effectively exert a "cradle to grave" influence over the agency rulemaking process and there is widespread concern that the secrecy and delay imposed by OMB compromise the principles of openness and fairness under which agencies strive to develop their regulations.³⁰

In several instances these practices have caused OMB to perpetuate serious health risks in society, in others OMB has substantively altered regulations despite its lack of expertise in the subject area. A regulation affecting an airline may seem impersonal, but a regulation affecting a drug or a hazardous substance is not. In 1986, a federal court ruled that the government's unlawful delay in issuing regulations governing storage of hazardous waste in tanks was caused by OMB. The court further stated that:

The use of E.O. 12291 to create delays and to impose substantive changes raises some constitutional concerns. Congress enacts environmental legislation after years of study and deliberation, and then delegates to the expert judgement of the EPA Administrator the authority to issue regulations carrying out the aim of the law. Under E.O. 12291, if used improperly, OMB could withhold approval until the acceptance of certain content in the promulgation of any new EPA regulation, thereby encroaching upon the independence and expertise of EPA. Further, unsuccessful executive lobbying on Capitol Hill can still be pursued administratively by delaying the enactment of regulations beyond the date of a statutory deadline. This is incompatible with the will of Congress and cannot be sustained as a valid exercise of the President's Article II powers.³¹

ASPIRIN AND REYE SYNDROME

OMB's interference with regulations to decrease human health risks is nowhere more apparent than in the case of the fatal link between aspirin and Reye Syndrome (pronounced "rye") in children. In June 1982, the Department of Health and Human Services (HHS) announced its proposal to use radio advertisements and place warning labels on containers of aspirin warning parents of the possible dangers. OMB, positioned by the Reagan executive order to review the proposed regulation, chose to ignore authoritative medical findings by the U.S. Centers for Disease Control (CDC) and experts in the field of rare diseases, siding instead with the aspirin industry to prevent the labeling. Within five months of the proposed HHS campaign, OMB placed a phone call to the Secretary for Health and Human Services who withdrew the proposed regulation for further study.³²

Strong evidence supported the need for preventive measures in 1982, if not earlier. Reye Syndrome is a life threatening condition that may follow influenza or chicken pox infections in children. At the end of 1981, the CDC, the Public Health Service facility in Atlanta, reported that an estimated 1,200 cases of Reye Syndrome occurred annually, and the death rate was 30% for reported cases. Permanent brain damage and other problems may occur even if the affected child does not die. However, Reye Syndrome is difficult to diagnose because its symptoms are easily confused with other illnesses, including meningitis, encephalitis, or even drug overdose hallucinations.³³ Four studies conducted between 1978 and 1981 by the state health departments of Ohio, Michigan, and Arizona provided the most convincing evidence of a fatal link between aspirin use by children and Reye Syndrome. The Ohio study alone showed that children

who came down with Reye Syndrome were ten times as likely to have taken aspirin as those who did not contract the disease.³⁴

The CDC reports prompted the Surgeon General, Dr. Everett Koop, to issue an advisory cautioning against the use of aspirin for children with influenza or chicken pox. The Surgeon General was joined by the CDC, the Food and Drug Administration, and the American Academy of Pediatrics in urging the government to warn parents and physicians of potential dangers.

OMB, however, chose to listen to aspirin manufacturers, who met with OMB officials privately, and estimated that the industry could lose \$100 million in sales. The aspirin makers commissioned their own study which concluded, amazingly, that there was no relationship between aspirin and Reye Syndrome. The FDA and even OMB's own analysts rejected these conclusions.³⁵

OMB's final decision on warnings was not made, however, by its analysts but by its regulatory affairs chief. Ignoring all authoritative scientific evidence, affirmations of the fatal link between aspirin use in children and Reye Syndrome by the White House Office of Science and Technology Policy, and even OMB's own statisticians, the regulatory affairs chief told the Secretary of Health and Human Services to withdraw the proposed warnings. The decision was based on a conversation with the OMB official's wife, a pediatrician who did not accept the scientific conclusions, and the intense lobbying by the aspirin industry.³⁶

Since 1982, the evidence supporting warning labels has increased. In 1983, the *New England Journal of Medicine* reported that Reye Syndrome was 10 to 20 times more common than doctors had believed.³⁷ In 1984, another study by the U.S. Centers for Disease Control concluded that children suffering from influenza or chicken pox were 12 to 25 times more likely to contract Reye Syndrome if treated with aspirin, than those who were not.³⁸ In 1984, 190 cases of Reye Syndrome were reported, 26% of them were fatal, and many survivors suffered brain damage.³⁹ Finally in 1985, the aspirin industry entered into an agreement with the Department of Health and Human Services to issue warning labels and public service announcements against aspirin use for flu or chicken pox in children. The industry remained reluctant, however, to state the relationship of aspirin to Reye Syndrome. If OMB had not interfered many children could have been saved from the fatal and permanently disabling effects of Reye Syndrome.

ASBESTOS AND CANCER

A second example has been OMB's interference with the Environmental Protection Agency's proposed ban on certain asbestos products and uses. Asbestos is a known cancer-causing material used in buildings for insulation, floor and ceiling tiles, paints and joint compounds. EPA was supported in its efforts by scientific studies demonstrating the harmful effects of asbestos. Following an lengthy investigation, Congress acted to remove asbestos from schools and other public buildings.

In order to preserve commercial interests in asbestos, OMB disagreed with Congress and the EPA. OMB delayed its review of the EPA proposed ban for many months, stating that "cost/benefit" standards had not been met. According to this standard, OMB created a "discounting human lives saved" concept in order to decrease the value of the benefits of asbestos regulations, as weighed against the costs of the regulation to the industry. As stated by House Energy and Commerce Chairman John Dingell (D-MI) in a thorough review of OMB interference with EPA asbestos regulations:

Under this discounting approach, the OMB's cost-benefit analysis of the proposed asbestos regulations computes human life at a base value of \$1 million -- and then discounts that value over the 30 to 40 year latency period for asbestos-related cancer. This arbitrary and callous discounting methodology would reduce the value of life to a figure as low as \$22,500, thereby undervaluing the benefits of health and safety regulations and thwarting the regulation of many toxic substances evaluated under the cost-benefit criteria of Executive Order 12291.⁴⁰

While the problem of public exposure to asbestos persisted, OMB worked secretly to undercut EPA's ban. OMB met twelve times with representatives from the asbestos industry,⁴¹ and was particularly responsive to officials from Canada, where asbestos is a major export product. In 1986, it was revealed that the director of OMB's regulatory review office met secretly with Canadian officials to assure them of OMB's intent to undercut the ban. In a subsequent communication, the OMB official stated that OMB "remains opposed to [the] banning and it will actively work toward this end in [the] regulatory process."⁴²

CHEMICALLY TREATED FOOD

In another example, the delay and burden of passing OMB's "cost/benefit" test posed a continued risk to human lives from chemically treated fruits and vegetables. In 1985, the Food and Drug Administration proposed regulations banning certain uses of sulfites which had led to twelve deaths. During a lengthy delay posed by OMB's "cost/benefit" review, a 44-year old woman died after eating sulfite-treated food in a restaurant.⁴³

At a 1986 Senate hearing on OMB policy making, Senator Carl Levin (D-MI), Chairman of the Subcommittee on Governmental Affairs, stressed that, "These are obvious life and death decisions. Who's making these decisions has been hidden from the public."⁴⁴

OMB's power and control over the federal government is unprecedented. It is especially ironic that an administration so outwardly committed to "decentralizing" the federal government has centralized its power at OMB so quickly. Within one month of entering office, President Reagan empowered OMB to oversee regulations proposed by federal agencies, requiring agencies to conform with OMB's "cost/benefit" analyses and gave OMB broad authority over the content and fate of regulations.⁴⁵ In 1985, through an order implemented by then OMB official Douglas Ginsburg, President Reagan made

OMB responsible for the regulatory program of the federal government.⁴⁶ As Congress observed in its comprehensive 1986 report:

The Reagan Administration's designation of OMB's Office of Information and Regulatory Affairs (OIRA) as its central clearance arm for regulatory policy capitalized on a national mandate for regulatory relief and set in motion -- administratively -- the most sweeping reform of the regulatory process in 35 years.⁴⁷

Since 1981 the requirement that agencies adopt OMB's substantive recommendations has permitted OMB to rewrite agency regulations and supplant them with the administration's own policies. The White House's commitment to this process was boldly demonstrated when Congress threatened action in 1986 to eliminate the OMB office responsible for regulatory review. OMB Director James Miller III pledged that, if Congress eliminated OMB's office for reviewing and rewriting regulations:

We will do it in the White House. If [you take] the office out of the White House, we will do it in the Justice Department. If you take the office out of the Justice Department, we will do it in Commerce.⁴⁸

Just what does OMB do that it refuses to stop? An analysis of OMB regulatory review from 1981-1986 by OMB Watch, revealed that ten federal agencies have been subject to the harshest OMB action. In these agencies, 30%-40% of the regulations proposed have been either altered or not approved by OMB.⁴⁹ The top ten agencies on the "OMB Hit List" include:

- Department of Labor
- Department of Education
- Department of Housing and Urban Development
- Department of Health and Human Services
- Department of Commerce
- Department of Transportation
- Environmental Protection Agency
- Small Business Administration
- Department of Energy
- Veterans Administration

Is it possible for a federal agency, created and staffed for overseeing management and budget issues, to evaluate the substance of regulations at these and other agencies? The 700-page *Regulatory Program* issued by the White House shows that by 1986 OMB was reviewing and rewriting a diverse range of regulations in areas which it had no expertise. These included civil rights,⁵⁰ mental retardation,⁵¹ and cancer.⁵² In addition to lacking expertise in these and other subjects, OMB's activity remains unaccountable, and its business is conducted in virtual secrecy.

OMB CONTROL OF FEDERAL STUDIES

OMB's authority to review proposed regulations is coupled with its authority over other proposed agency activity including federal studies and surveys. Such studies can range from air quality to welfare reform, and often have a important impact on improving the quality of the environment, the safety of the workplace, and the assurance of a good standard of living. Just as in the regulatory area, OMB has the power to rewrite, redesign, or simply reject proposed studies. Many observers believe that OMB's interference with federal studies constitutes a more egregious abuse of its authority than in the regulatory area.⁵³ This is because it prevents the government from identifying new developments and problems, many of which are within the scope of protections required by law.

OMB's review of vital studies related to health and the environment have come under especially sharp criticism. In 1986, Congressman Ted Weiss (D-NY), Chairman of a House subcommittee investigating OMB review practices, found that OMB was:

seven times more likely to reject or revise studies with an environmental or occupational health focus than to reject or revise studies that focused on infectious or other diseases. In addition, studies focusing on reproductive health hazards were more likely to be rejected by OMB than were other types of studies.⁵⁴

In 1987, scientists from the Harvard School of Public Health examined OMB's review of 51 studies proposed by the U.S. Centers for Disease Control during 1984-1986. The report concluded that OMB's review process was:

poorly documented and often demonstrated a dismaying ignorance of the fundamentals of science and public decisionmaking ... the health policy implications are serious; OMB is clearly interfering with the substance of CDC research. OMB has delayed, impeded, and thwarted governmental research efforts designed to answer public demands for information on serious public health questions.⁵⁵

OMB has abused its authority by rejecting and delaying timely and important studies. It has bowed to pressure from affected industries while failing to incorporate the findings of authoritative researchers and specialists. Most distressing, however, are the human consequences of OMB's actions. The most compelling evidence comes from specific cases of OMB review.

OMB's review of federal studies in the area of occupational illness has had especially important consequences. In 1984-85, OMB rejected four studies of occupational health hazards. Three were resubmitted and eventually approved contingent on adopting OMB's changes.⁵⁶ Occupational health hazards cause the death of an estimated 100,000 Americans annually, and cause sickness among 400,000 more.⁵⁷ Health risks to pregnant women in the workplace are a particularly growing concern. Recent statistics show that

63% of married American women are employed during the year before giving birth. More than 300,000 of these women work in occupations where they risk exposure to substances known to cause birth defects.⁵⁸

Study of Video Display Terminals. One controversial OMB decision concerns a study of the reproductive health hazards to women using video display terminals (VDTs) on computers. Congress reported that "approximately 10 million American women use VDTs every day making this a very important issue to American workers."⁵⁹

The National Institute for Occupational Safety and Health (NIOSH) had been planning a study of women using VDTs since 1982. The study was triggered by reports of birth defects and miscarriages associated with women's VDT use, and the federally funded study was planned as the first major scientific research endeavor to examine this health issue.

The study design was completed in 1985, but OMB refused to approve it. NIOSH amended the study to meet OMB's concerns but in 1986 OMB responded by offering a conditional approval only if 69 questions were omitted. Many of the questions were essential to measure the existence of stress at work and problems of fertility.

Congress became alarmed at OMB's interference with the NIOSH study and, after a thorough investigation, found many disturbing aspects of OMB's review of the VDT study: OMB's redesign of the study conflicted with established methods for evaluating occupational stress; OMB had adopted design changes to reduce the potential impact on the corporation whose workers were to be studied; the target corporation had provided OMB with a new design by two consulting scientists, neither of whom specialized in occupational stress or women's health; and one of the target corporation's consulting scientists later stated that their conclusions did not support the changes proposed for the NIOSH study.

Study of Infant Mortality Rates. A second case involves the issue of infant mortality rates in the United States and illustrates the unresponsiveness of government to address important problems because the decisions are placed in the hands of OMB. In 1984, the Children's Defense Fund, analyzing census records determined that the earlier trends of lower infant mortality rates had failed to continue in recent years. In order to further explore the problem, the Public Health Service proposed a study of the relationship between federal funding cuts and infant mortality rates. The proposed study sought to determine whether maternal and child health and nutrition programs were inadequately funded and a cause of higher infant mortality rates in some states. The administration had challenged the Children Defense Fund's findings when first released, attributing them to statistical fluctuations. In 1985, OMB disapproved the Public Health Service study under its regulatory review powers, as a significant regulatory act that was "inconsistent with the Administration's policies."

The enormous role which OMB has been given in government between 1981-1987 is evidenced not only by the breadth of authority, but by its application to everyday concerns to Americans. It may seem ironic that such power has been centralized in one White House office by a president who has promised the nation a "new federalism" of decentralized government. The behavior of OMB has shown that nothing could be farther from the truth.

No one is surprised to learn that government is powerful, but it is disturbing to discover that so much power has been exercised in secrecy. While positioned close to the president, OMB operates from deep within an already inaccessible bureaucracy. Just as in other improper uses of government secrecy, OMB has avoided accountability and undercut the checks and balances of our constitutional system. It has made decisions without democratic participation, and has protected private interests, often negotiated behind closed doors.

